STUDY

Requested by the AFCO committee

European Parliament

The use of Article 122 TFEU

Institutional implications and impact on democratic accountability

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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The use of Article 122 TFEU

Institutional implications and impact on democratic accountability

Abstract

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, looks into the peculiar nature of Article 122 TFEU as a non-legislative legal basis pursuant to which the European Parliament is not involved in the decision-making. It concludes that the recent recourse to Article 122 TFEU was legally defensible but that the Council does not sufficiently take into account the 'without prejudice to' clause in Article 122(1) TFEU. The analysis identifies different ways to bolster Parliament's position under the current Article 122 TFEU and makes suggestions for Treaty amendment.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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LIST OF ABBREVIATIONS

AFCO	Committee on Constitutional Affairs
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CLS	Legal Service of the Council of the European Union
ECB	European Central Bank
EEC	European Economic Community
EFSM	European Financial Stability Mechanism
EMU	Economic and Monetary Union
ESM	European Stability Mechanism
EURI	EU Recovery Instrument
IIA	Interinstitutional agreement
MEP(s)	Member(s) of European Parliament
MFF	Multiannual financial framework
NGEU	Next Generation EU
OLP	Ordinary legislative procedure
ORD	Own resources decision
QMV	Qualified majority voting
RRF	Recovery and Resilience Facility
SLP	Special legislative procedure
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

This study was commissioned against the background of a recent surge in reliance on Article 122 TFEU as a legal basis. This recent surge must be nuanced since in different periods in the past, the Council of the European Union (Council) relied much more intensively on (the precursors of) Article 122 TFEU. Still, the recently adopted measures do seem to differ from earlier adopted measures given their economic significance. To assess the constitutionality of the Council's reliance on Article 122 TFEU, the peculiar, non-legislative, nature of Article 122 TFEU must be stressed. While it results in decision-making procedures with lower transparency and lower parliamentary involvement, in themselves, reduced transparency and parliamentary involvement are not pertinent when assessing the Council's recourse to the legal bases in Article 122 TFEU. After all, it is not the procedures that define the legal basis of a measure but instead, the legal basis of a measure determines the procedure to be followed. In turn, the legal basis should only be assessed in light of the standard 'choice of legal basis' test established by the Court of Justice.

To apply this test, the precise scope of the two legal bases in Article 122 TFEU is to be understood as follows: only Article 122(2) TFEU is a genuine emergency legal basis. Article 122(1) TFEU is not a crisis legal basis and, therefore, has a wider scope. Two main limits to the exceptionally broad power conferred by Article 122(1) TFEU on the Council exist. First, recourse to Article 122(1) TFEU to develop economic policy must not undermine or turn upside down the principle flowing from Articles 2(3) and Article 5(1) TFEU that the Member States remain the primary actors responsible for economic policy. Second, Article 122(1) TFEU prescribes that it is without prejudice to other legal bases in the Treaties. However, this does not result in an absolute priority of those other legal bases over Article 122(1) TFEU. Instead, measures of which the aim and content points to another legal basis in the Treaties could still be adopted based on Article 122(1) TFEU if the context so requires.

In light of that understanding of the two legal bases in Article 122 TFEU, substantively, the measures recently adopted in the wake of the pandemic and the energy crisis appear to be properly based on Article 122 TFEU. However, the Council does not sufficiently motivate its measures in light of the 'without prejudice to' clause of Article 122(1) TFEU. The European Parliament's (Parliament) prerogatives would thus be better safeguarded by forcing the Council – and the European Commission (Commission) – to explicitly motivate the measures (and proposals) in light of the 'without prejudice to' clause. In addition, an explicit agreement could be reached between the political institutions on the 'facultative' consultation by default of Parliament whenever the adoption of Article 122 TFEU measures is contemplated. Such an approach appears more sound than leveraging Parliament's budgetary powers. The mechanisms established by the interinstitutional agreements of 16 December 2020 should remain budgetary mechanisms and should not be distorted to pursue (political) objectives unrelated to budgetary matters.

Finally, while the options for improving Parliament's position in the decision-making are almost unlimited when the Treaties would be amended, it appears advisable not to do so by prescribing the ordinary legislative procedure. Instead, a special legislative procedure prescribing the consent of Parliament appears more appropriate to ensure both greater transparency and Parliamentary involvement, without sacrificing speediness in those cases where urgent action is required.

KEY FINDINGS

- The recent recourse to Article 122 TFEU as the legal basis for emergency measures is not exceptional from a historical perspective, since the precursors to Article 122 TFEU have, at times, been relied on even more frequently.
- **Although both legal bases in Article 122 TFEU are usually conceptualised as emergency legal bases, this is only the case for Article 122(2) TFEU**. While **Article 122(1) TFEU** can therefore be relied on other than in emergency situations, the '**without prejudice to' clause** which introduces this provision **ensures that reliance on this exceptionally broad legal basis does not go at the expense of the prerogatives of the Parliament**.
- In its recent decisions, the **Council has not sufficiently motivated, its recourse to Article 122 TFEU in light of that 'without prejudice to' clause**. One suggestion made is to **ensure a more explicit and detailed statement of reasons whenever the Council relies on Article 122 TFEU**.
- The study questions **the potential of the budgetary interinstitutional agreements of December 2020** to ensure greater involvement of Parliament in the decision-making pursuant to Article 122 TFEU. Instead, and staying within the current Treaty framework, the suggestion is made to **ensure agreement between Parliament and Council on the facultative consultation of the Parliament under Article 122 TFEU**.
- In terms of a possible amendment of Article 122 TFEU this study argues a**gainst the insertion of the ordinary legislative procedure in Article 122 TFEU** and **in favour of a special legislative procedure pursuant to which Parliament has the power of consent**.

1. INTRODUCTION*

This study was commissioned against the background of a recent surge in reliance on Article 122 TFEU as a legal basis. On several occasions, and most recently in the context of the energy crisis, several Members of the European Parliament (MEPs) as well as its President have expressed their concerns over the increased use of Article 122 TFEU as a legal basis for legislation that they believe could also be dealt with under the ordinary legislative procedure (OLP), arguing, in particular, that Commission proposals get blocked in the Council and that in these cases, procedures where legislative responsibility is shared between Parliament and the Council would have allowed for progress.[1] Also, according to different MEPs, the use of ordinary legislative procedure with proper parliamentary oversight would be less destabilising for the institutional balance enshrined in the Treaties.[2]

To determine whether the recent recourse to Article 122 TFEU is indeed legally problematic (rather than merely politically undesirable from the perspective of Parliament) this study will proceed in five steps. First (in Section 2) the peculiar nature of the legal bases in Article 122 TFEU will be highlighted. The fact that Article 122 TFEU atypically confers non-legislative powers on the Council raises a number of important constitutional questions that need to be addressed before assessing the legality of some of the recent measures. Second (in Section 3), the historical evolution and changes to this provision (which finds its origin in the Rome Treaties) will be presented. Also the historical reliance on this provision will be briefly discussed to put the recent surge in reliance on Article 122 TFEU into perspective. Since Parliament is completely sidelined in the decision-making procedures under Article 122 TFEU, the imperative question as to the proper scope of that Treaty provision will be addressed in a third step (in Section 4). Having identified that scope, this in-depth study will, in a fourth step (in Section 5), assess three measures recently adopted pursuant to Article 122 TFEU to verify whether the Council did not act *ultra vires*. As a final step (in Section 6), this study will first explore different ways of how Parliament's role may be strengthened (and has been strengthened) under the existing Treaty framework (in Section 6.1) before commenting on some of the recent proposals made within the European Parliament to formally amend Article 122 TFEU (in Section 6.2).

* The author wishes to thank Bruno De Witte and Guido Bellenghi for their comments on an earlier draft. Any errors or omissions remain his own.

1 See the observations made by President of the European Parliament Metsola at the European Council meeting of 15 December 2022.

2 See European Parliament, Conference of Presidents - Minutes of the ordinary meeting of 24 November 2022.

2. ARTICLE 122 TFEU

The recent surge in recourse to Article 122(1) and (2) TFEU as legal bases raises important challenges for the legitimacy of EU action. Before these can be assessed and possibly remedied, it is crucial to properly understand the aim, scope and application of Article 122 TFEU. In the following sections this in-depth study will therefore first look into the specific type of legal basis which Article 122 TFEU constitutes, since it is not a typical legislative legal basis.

2.1. A peculiar legal basis

Before looking into the historical development of and reliance on Article 122 TFEU (and its precursors), it is useful to emphasize an important feature of Article 122 TFEU that was introduced by the Lisbon Treaty. As discussed extensively elsewhere,[3] the Lisbon Treaty formally introduced the notions of legislative (and non-legislative) acts in EU law. While the notion of legislative act was used previously in a colloquial sense, formally the EU legal order only recognized 'basic acts' (adopted pursuant to a legal basis in the Treaties) and 'implementing acts' (acts adopted pursuant to 'basic acts').[4] The Lisbon Treaty changed this by introducing the distinction between legislative, delegated and implementing acts in Articles 289–291 TFEU. These Articles essentially took over the provisions of Articles I–34 to I–37 of the Constitutional Treaty. Differently from the latter Treaty however, the Lisbon Treaty did not specifically recognize the existence of 'non-legislative acts' that are adopted pursuant to a legal basis in the TEU or TFEU and omitted to reproduce Article I–35 of the Constitution devoted to such non-legislative acts.[5]

2.1.1. The difference between legislative and non-legislative legal bases

At the same time, and just like the Constitutional Treaty, the Lisbon Treaty retained several legal bases granting powers to the Council, European Council, Commission and European Central Bank that do not prescribe recourse to the ordinary or special legislative procedures. Given that EU legal acts can only be legislative acts if they are adopted pursuant to a legal basis that *explicitly* identifies the procedure to be followed as a legislative procedure,[6] the acts adopted pursuant to those other legal bases must be non-legislative. The powers conferred pursuant to these legal bases may be termed 'autonomous executive powers', given their non-legislative (i.e. executive) nature and the fact that they do not,

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3 Merijn Chamon, *The European Parliament and Delegated Legislation - An Institutional Balance Perspective*, Oxford, Hart Publishing, pp. 13-16; Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, pp. 22-26.

4 Case 25/70, *Köster*, ECLI:EU:C:1970:115, para. 6.

5 Article I-35 of the Constitution itself was based on Article I-34 of the Draft Constitution which was even clearer on the matter as it i.a. provided that "[t]he Council of Ministers and the Commission shall adopt European regulations or European decisions […] in the cases specifically provided for in the Constitution."

6 As confirmed by the Court in Joined Cases C-643/15 and C-647/15, *Slovakia & Hungary v Council*, ECLI:EU:C:2017:631, para. 62. Emphasising this is the only relevant criterion to qualify a legal basis as granting legislative powers, see Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, p. 88.

differently from delegated and implementing powers, depend on a prior empowerment in secondary law (i.e. they are autonomous).

At times these legal bases conferring autonomous executive powers may be confusing since *materially* they can be relied on to adopt legal acts that may well be legislative in nature, and the procedures which they prescribe may appear identical to a special legislative procedure (SLP) in almost everything but name.[7] However, the fact that they are non-legislative in nature does have important legal and practical ramifications, which is why their inclusion in the TEU and TFEU has been deplored by commentators.[8] Indeed, the requirements prescribed for legislative decision-making will not apply for autonomous executive acts.[9] As a result, proposals by the Commission do not need to be sent to national parliaments pursuant to Protocol No 1;[10] the national parliaments' subsidiarity scrutiny pursuant to Protocol No 2 is not applicable;[11] the deliberations in the Council are not public;[12] and the balance between the transparency and confidentiality of the decision-making procedure, when assessing requests for access to documents, will tilt more in favour of the latter.[13]

2.1.2. Absence of hierarchy between legislative and non-legislative legal bases

Do these important procedural differences also translate into a subordination of autonomous executive acts to legislative acts or in a more limited material scope of autonomous executive acts compared to legislative acts? These questions will be addressed in turn. The first question has not yet been fully clarified by the Court of Justice in its post-Lisbon jurisprudence, but it would seem that this is not the case. At first sight, the Court's judgments in *Slovakia & Hungary v Council* and *Parliament & Commission v Council* might be read as confirming a hierarchy between legislative legal bases and non-legislative legal bases. However, a closer scrutiny of these cases suggests that both types of legal bases are in fact on an equal footing.[14] The legal bases at issue in those sets of cases were Articles 43(3) TFEU and 78(3) TFEU. In *Slovakia & Hungary v Council* the Court ruled that the executive measures based on Article 78(3) TFEU, establishing a relocation mechanism for refugees, could not have "either the object or effect of replacing legislative acts or amending them permanently and generally, thereby

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7 This may even put the most experienced EU lawyers on the wrong foot. See for instance AG Ćapeta who qualified the procedure in Article 43(3) TFEU as a special legislative procedure. See Opinion of AG Ćapeta in Case C-330/22, *Friends of the Irish Environment CLG*, ECLI:EU:C:2023:487, para. 19.

8 See Bruno De Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty', in: Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Wien, Springer, 2008, pp. 100-102; Paolo Stancanelli, 'Le système décisionnel de l'Union', in: Giuliano Amato, Hervé Bribosia and Bruno De Witte (eds), Genèse et destinée de la constitution européenne: commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir, Bruxelles, Bruylant, 2007, pp. 517-519. Otto correctly notes however that despite the fact that the Treaty authors' choices (qualifying legal bases as either legislative or non-legislative) may appear random in several instances, these choices are part of primary law and hence need to be accepted as given. See Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, p. 26.

9 Stressing this, see Opinion of AG Bot in Joined cases C-643/15 and C-647/15, *Slovakia & Hungary v Council*, ECLI:EU:C:2017:618, para. 58; Joined Cases C-643/15 and C-647/15, *Slovakia & Hungary v Council*, ECLI:EU:C:2017:631, para. 59.

10 Article 2 of Protocol No 1 provides that draft legislative acts are forwarded to the national parliaments.

11 Like Protocol No 1, the requirements imposed on the Commission and the *droit de regard* conferred on national parliaments pursuant to Protocol No 2 only applies to draft legislative acts.

12 See Article 16(8) TEU.

13 See Case C-156/21, *Hungary v Parliament & Council*, ECLI:EU:C:2022:97, para. 58.

14 See also Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, pp. 78-83.

circumventing the ordinary legislative procedure provided for in Article 78(2) TFEU."[15] In *Parliament & Commission v Council*, the Court held that measures adopted pursuant to Article 43(3) TFEU "are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) [which prescribes the OLP]".[16] However, the subordination of the (executive) legal bases in these cases (Articles 43(3) and 78(3) TFEU) to the legislative legal bases in Articles 43(2) and 78(2) TFEU did not follow from their executive nature as such but from the Court's systemic and combined reading of the different legal bases at issue.[17] In identifying the proper scope of the executive legal bases, the Court recognized that they needed to be read together with the associated legislative legal bases in the preceding paragraphs to give a useful effect to *both*.[18] That there is no inherent hierarchy between the two types of legal bases is further evidenced by the fact that the Court, in both cases, applied its standard choice of legal basis test to determine whether the executive legal basis relied on was indeed the proper legal basis.

From a systemic perspective it could not be otherwise since several legal bases granting autonomous executive powers are 'self-standing' and do not figure next to legislative legal bases like the third paragraphs of Articles 43 and 78 TFEU do.[19] For those 'self-standing' legal bases, like Article 122(1) and (2) there would not be an immediate legislative legal basis to prioritise to begin with. To summarise then, there is no inherent hierarchy between legislative and non-legislative legal bases in the Treaties,[20] and instead the choice between either of them is governed by the same, venerable, test which prescribes that the choice of legal basis is determined by objective factors that are amenable to judicial review, such as the aim, content and context of the measure to be adopted.[21] As the Court held on another occasion, "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure."[22] When confronted with a choice between two legal bases, the consideration that one of them confers a legislative power while the other confers an executive power is therefore immaterial, regardless of the consequences which this may have for the democratic legitimacy of the measure to be adopted.[23]

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15 Joined Cases C-643/15 and C-647/15, *Slovakia & Hungary v Council*, ECLI:EU:C:2017:631, para. 78.

16 Joined Cases C-103/12 and C-165/12, *Parliament & Commission v Council*, ECLI:EU:C:2014:2400, para. 50.

17 See also Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, p. 87.

18 See Case C-259/21, *Parliament v Council*, ECLI:EU:C:2022:917, para. 63.

19 See e.g. Articles 31, 44(2) and 70 TFEU.

20 See also René Barents, 'De post-Lissabonrechtspraak over het institutioneel evenwicht', (2019) 67 *Tijdschrift voor Europees en economisch recht* 7/8, p. 341.

21 Case C-656/11, *UK v Council*, ECLI:EU:C:2014:97, paras 47-50.

22 Case C-130/10, *Parliament v Council*, ECLI:EU:C:2012:472, para. 80.

23 Engel notes that there may be a 'democracy maximizing rationale' in the choice of legal basis test, where the Court takes into account the consequences for Parliament's involvement in the decision-making procedure. See Annegret Engel, *The Choice of Legal Basis for Acts of the European Union*, Cham, Springer, 2018, pp. 87-90. However, this is based on older case law of the Court were the choice of legal basis test, just like the principle of institutional balance, was used by the Court to strengthen the Parliament's overall weak formal position under the Treaties. That rationale is not present anymore today, since the Treaty authors themselves have strengthened the position of Parliament in the Treaties. In this vein, see e.g. Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:202, paras 43-63.

2.1.3. No *a priori* limited scope of non-legislative legal bases

The autonomous executive acts, due to their autonomy, are therefore not inherently subordinate to legislative acts, differently from delegated and implementing acts.[24] A second question is whether, despite the lack of such a hierarchy, autonomous executive acts are more limited in their material scope than legislative acts, given their executive nature. Also this question must be answered in the negative. Here it should be recalled that pre-Lisbon, the autonomous executive acts and legislative acts were on the same footing and were indiscriminately considered 'basic acts' on which the Court in *Köster* ruled that they should lay down the essential elements of the issue to be regulated.[25] That the Lisbon Treaty reproduced this part of *Köster* in Article 290 TFEU, requiring legislative acts to lay down the essential elements, does not *a contrario* mean that autonomous executive acts cannot contain essential elements or that they should be limited, like delegated acts, to regulating non-essential elements.[26] In *Germany v Parliament and Council*, the Court also explicitly rejected Parliament's argument that the Council's executive power under Article 43(3) TFEU should be treated similarly to an implementing power in the sense of Article 291 TFEU. The test for the latter is that "the provisions of an implementing act […] must, first, comply with the essential general aims pursued by the legislative act which those provisions are expected to clarify, and second, be necessary or appropriate for the uniform implementation of that act without supplementing or amending it, even as to its non-essential elements."[27] However, In *Germany v Parliament and Council*, the Court held that acts adopted pursuant to Article 43(3) TFEU "are not simply to be considered the same as those conferring implementing powers, within the meaning of Article 291(2) TFEU [and instead, Article 43(3) TFEU] grants the Council the power to adopt acts going beyond what can be regarded as an 'implementing act'."[28] While the Court only made this observation in relation to Article 43(3) TFEU, there is no reason why it would not *a fortiori* apply to the other Treaty provisions conferring autonomous executive powers as well.

2.2. Repercussions for the recourse to Article 122 TFEU

The above digression into the peculiar nature of the legal bases in the Treaties conferring autonomous executive powers was necessary in order to properly conceptualise the power conferred by Article 122 TFEU. Doing so is crucial to set the right limits to the Council's recourse to this provision and to discard possible 'intuitive' objections to recourse to Article 122 TFEU. More concretely: that fact that Article 122 TFEU does not prescribe a legislative procedure, with the result of reduced transparency, is in itself no legal reason to limit recourse to this provision. Similarly, Article 122 TFEU conferring an executive power does not mean that acts adopted pursuant to that legal basis are inferior to legislative acts or are in any way restricted in which (essential) elements they can touch upon. Instead, as the case law cited in the

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[24] Here it should be noted that there is an inherent hierarchy between a delegated or implementing act and its 'parent' act. It is less clear in how far there is such a hierarchy between delegated or implementing acts and legislative acts that are not parent acts. See Opinion of AG Mengozzi in Case C-355/10, *Parliament v Council*, ECLI:EU:C:2012:207, paras 76-88. Discussing earlier suggestions on a general hierarchy, see See Carlos-Manuel Alves, 'La hiérarchie du droit dérivé unilatéral à la lumière de la Constitution européenne: révolution juridique ou sacrifice au nominalisme?' (2004) 40 *Cahiers de droit européen* 5-6, pp. 695-697.

[25] Case 25/70, *Köster*, ECLI:EU:C:1970:115, para. 6.

[26] See also Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Tübingen, Mohr Siebeck, 2022, pp. 69-70.

[27] Case C-695/20, *Fenix International*, ECLI:EU:C:2023:127, para. 44.

[28] Case C-113/14, *Germany v Parliament & Council*, ECLI:EU:C:2016:635, paras 56-57.

above paragraphs suggests, the scope of Article 122 TFEU and the possible measures which can be adopted pursuant to it depend on the wording of the provision. This is all the more so since differently from legal bases such as Articles 43(3) and 78(3) TFEU, the two legal bases in Article 122 TFEU are 'self-standing. As a result, they are no complement or corollary to a legal basis conferring a legislative power.

3. THE EVOLUTION OF ARTICLE 122 TFEU AND ITS PRECURSORS SINCE 1958

Article 122 TFEU has a long pedigree as its origins go back to the Rome Treaties and Article 103 EEC. Table 1 below shows the changes which the original Article 103 EEC, which contained the current Article 122(1) TFEU, underwent throughout successive Treaty changes.[29] In the Maastricht Treaty, the current Article 122 TFEU was taken out of the original Article 103 EEC, the latter becoming the current Article 121 TFEU. Following the removal of the reference to 'economic trends', Article 103a also ceased to be a provision on conjunctural policy and, instead, turned into a more general provision on economic policy.[30] The Maastricht Treaty further added the current second paragraph of Article 122 TFEU as a counterweight to the no-bailout clause of Article 125 TFEU,[31] to exceptionally allow support to those Member States that have adopted the euro. The latter cannot benefit (anymore) from the support mechanisms foreseen in Article 143–144 TFEU (which are reserved to Member States with a derogation from adopting the euro).[32] While the Amsterdam Treaty only changed the numbering of the Article, the Nice Treaty made the most significant change by prescribing qualified majority voting, rather than unanimity, under both paragraphs. Finally, the Lisbon Treaty amended the first paragraph, clarifying, but not altering (see Section 4.1.1), the purpose of the measures adopted pursuant thereto. These measures should be informed by the idea of solidarity between the Member States and may notably relate to supply problems in the energy sector.

Table 1: Article 122 TFEU and its precursors

Source: Author's own compilation.

[29] For a more elaborate discussion of the development of Article 122 TFEU throughout successive Treaty revisions, see Jean-Victor Louis, 'Guest editorial: The No-Bailout Clause and Rescue Packages', (2010) 47 *Common Market Law Review* 4, pp. 981-984.

[30] See Rüdiger Bandilla, 'Art. 100 EGV', in Eberhard Grabitz & Meinhard Hilf (eds), *Das Recht der Europäischen Union*, München, Beck, EL 31, § 3.

[31] Ibid., § 9.

[32] See Rudolf Geiger, 'Art. 103a', in: *EG-Vertrag: Kommentar zu dem Vertrag zur Gründung der Europäischen Gemeinschaft*, München, Beck, 1993, § 6-8 at p. 327; Jörn Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 *Common Market Law Review* 2, pp. 273-274.

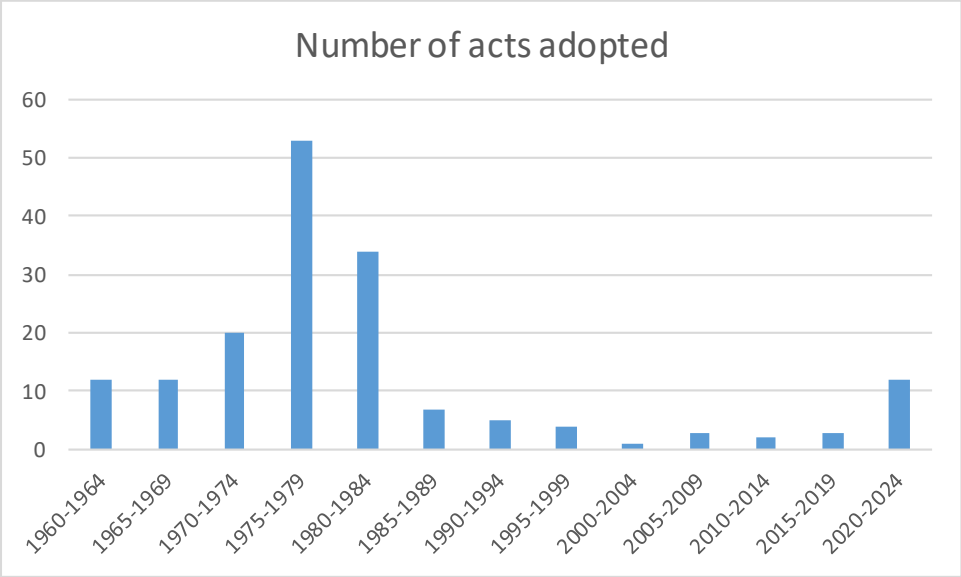
Original	Maastricht	Amsterdam	Nice	Lisbon
Article 103	*Article 103a*	*Article 100*	*Article 100*	*Article 122*
1. Member States shall consider their policy relating to economic trends as a matter of common interest. They shall consult with each other and with the Commission on measures to be taken in response to current circumstances.	1. Without prejudice to any other procedures provided for in this Treaty, the Council may, acting unanimously on a proposal from the Commission, decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.	1. Without prejudice to any other procedures provided for in this Treaty, the Council may, acting unanimously on a proposal from the Commission, decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.	1. Without prejudice to any other procedures provided for in this Treaty, the Council, acting by a qualified majority on a proposal from the Commission, may decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.	1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
2. Without prejudice to any other procedures provided for in this Treaty, the Council may, by means of a unanimous vote on a proposal of the Commission, decide on measures appropriate to the situation.	2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, the Council may, acting unanimously on a proposal from the Commission, grant, under certain conditions, Community financial assistance to the Member State concerned. Where the severe difficulties are caused by natural disasters, the Council shall act by qualified majority. The President of the Council shall inform the European Parliament of the decision taken.	2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, the Council may, acting unanimously on a proposal from the Commission, grant, under certain conditions, Community financial assistance to the Member State concerned. Where the severe difficulties are caused by natural disasters, the Council shall act by qualified majority. The President of the Council shall inform the European Parliament of the decision taken.	2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, acting by a qualified majority on a proposal from the Commission, may grant, under certain conditions, Community financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.	2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

3. The Council, acting by means of a qualified majority vote on a proposal of the Commission, shall, where necessary, issue any requisite directives concerning the particulars of application of the measures decided upon under the terms of paragraph 2.				
4. The procedures provided for in this Article shall apply also in the event of difficulties arising in connection with the supply of certain products.				

3.1. Reliance on Article 122 TFEU and its precursors

Since the current legal basis in Article 122(1) TFEU goes back to the original Rome Treaties as paragraphs 2 and 4 of Article 103 EEC, it is useful to have a look at how this legal basis has been relied on in the past. Since 1958, some 168 legal acts have been adopted pursuant to Article 122 TFEU and its precursors.[33] Table 2 shows the distribution of these acts according to five-year intervals.

Table 2: Legal acts adopted pursuant to Article 122 TFEU and its precursors



Source: EUR-Lex and author's own compilation.

While it puts the recent increase in reliance on Article 122 TFEU into perspective, it should be noted that it only does so in quantitative terms. Indeed, while the period between 1975 and 1985 was marked by prolific activity by the Council, most measures adopted in this timeframe were temporary measures in the field of fisheries, until the Common Fisheries Policy (CFP) was completed in 1983.[34] Some of the other older measures are conjunctural measures adopted pursuant to Article 103(1) EEC which now would come under Article 121 TFEU and should therefore not be considered Article 122 TFEU

[33] This number was obtained through a search on EUR-Lex at the end of June 2023. The query relied on was "DTS_SUBDOM = LEGISLATION AND (LB = 12016E122 OR LB = 12012E122 OR LB = 12010E122 OR LB = 12008E122 OR LB = 12006E100 OR LB=12002E100 OR LB = 11997E100 OR LB = 11992E103A OR LB = 11957E103)" The number obtained will not be entirely correct, given the possible coding errors on Eur-Lex and because the Council has sometimes omitted to explicitly identify the legal basis of measures which arguably did rely on Article 122 TFEU (or its precursors). An example of the latter is Council Regulation 2366/77 laying down interim measures for the conservation and management of North Sea herring, OJ 1977 L 277/8.

[34] See David Symes, 'The European Community's common fisheries policy', (1997) 35 *Ocean & Coastal Management* 2-3, p. 142.

measures.[35] Other measures related to the mechanism for medium-term financial assistance,[36] the precursor to the balance of payments facility which is now based on Article 143 TFEU.

Most of the historic measures, however, came under what now still constitutes Article 122 TFEU and related to diverse areas from the adjustment of intervention prizes in the Common Agricultural Policy (CAP) in response to monetary fluctuations,[37] over response measures to the 1970's energy crisis,[38] to the above noted temporary fisheries measures and measures suspending import tariffs on goods for which they were shortages on the internal market.[39] When these historic 'uses' of Article 122 TFEU died off, in particular, because of the realisation of the third stage of the European Monetary Union (EMU), the completion of the CFP and the reliance on Article 31 TFEU to suspend tariffs,[40] Article 122 TFEU legal bases were hardly relied on anymore. Indeed, the first time that Article 122(2) TFEU, which was introduced by the Maastricht Treaty, was relied on was in the context of the eurocrisis in 2010, with the establishment of the European Financial Stability Mechanism (EFSM).[41] However, it is only with the EU's response to the COVID-pandemic, notably the establishment of Next Generation EU (NGEU), and its response to the energy crisis following the full-scale invasion of Ukraine by Russia, that Article 122 TFEU really came into the limelight.

While the measures adopted recently pursuant to Article 122 TFEU may be fewer in quantity compared to those adopted in the 1970s and 1980s, they appear to be much more significant in terms of their qualitative impact. Indeed, some of the recent Article 122 TFEU measures have been described as entailing a paradigm shift in EU governance.[42] To assess this contemporary reliance on Article 122 TFEU and its legal soundness, the starting point is the proper interpretation of the Treaty provision in question.

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35 See e.g. Council Decision 74/120 on the attainment of a high degree of convergence of the economic policies of the Member States of the European Economic Community, OJ 1974 L 63/16.

36 See Council Decision 71/143 setting up machinery for medium-term financial assistance, OJ 1971 L 73/15.

37 See e.g. Règlement 1586/69 du Conseil relatif à certaines mesures relevant de la politique de conjoncture à prendre dans le secteur agricole à la suite de la dévaluation du franc français, OJ 1969 L 202/1.

38 See e.g. Council Directive 73/238 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products, OJ 1973 L 228/1.

39 See e.g. Council Regulation 2101/76 temporarily and totally suspending the autonomous Common Customs Tariff duties on a number of fresh or chilled vegetables, OJ 1976 L 235/17.

40 See Commission communication concerning autonomous tariff suspensions, OJ 1989 C 235/2, para. 1.1.

41 Council Regulation 407/2010 establishing a European financial stabilisation mechanism, OJ 2010 L 118/1.

42 René Repasi, 'A Dwarf in Size, But a Giant in Shifting a Paradigm – The European Instrument for Temporary Support to Mitigate Unemployment Risks (SURE)', *EU Law Live*, Weekend Edition No 19, 29 May 2020; Merijn Chamon, 'The Rise of Article 122 TFEU', *Verfassungsblog*, 1 February 2023.

4. IDENTIFYING THE PROPER SCOPE OF ARTICLE 122 TFEU

Under established case law of the Court of Justice, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[43] In relation to Article 122(1) TFEU this is important for two interpretative questions raised by this legal basis. The first relates to the nature of Article 122(1) TFEU as an emergency legal basis, the second concerns the meaning of the clause stating that recourse to Article 122(1) TFEU is 'without prejudice to any other procedures provided for in the Treaties'.

4.1.1. Article 122(1) TFEU as an exceptional but not an emergency clause

As regards the first question, it is important to note that the provision's wording is very open ended and is not textually restricted to the existence of a crisis or emergency, since the Council is empowered to adopt 'the measures appropriate to the economic situation'. While this clause also provides that this is so "in particular if severe difficulties arise in the supply of certain products, notably in the area of energy", it should be noted that 'in particular'[44] points to non-exhaustiveness[45] which in the present cases suggests that the 'severe difficulties' are merely illustrative of the situations in which the Council may adopt appropriate measures.[46] That the first paragraph of Article 122 TFEU is textually not limited to crises or emergencies and that it is a legal basis distinct from that in the second paragraph (which *is* a crisis legal basis, see Section 4.1.3), means that suggestions to the effect that Article 122 TFEU (as a whole) can only be relied on in crisis situations and can (therefore) only give rise to temporary measures,[47] should be approached with caution. Indeed, although past institutional practice in itself does not constitute an indication of lawfulness,[48] the Council has just recently relied on Article 122(1) TFEU to adopt two permanent framework instruments: one in relation to emergency support and another in relation to the supply of crisis-relevant medical countermeasures in the event of a public health emergency.[49]

In this regard, it is important to distinguish clearly the different clarifications brought by the Court in relation to Article 122 TFEU in the *Pringle* case. While the Court ruled that permanent mechanisms fall outside the scope of Article 122(2) TFEU (see below), it did not set a similar limit to the first paragraph. Instead, the Court held that Article 122(1) TFEU could not be applied to the establishment of the European Stability Mechanism (ESM) because that legal basis does not allow for financial assistance to

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43 See e.g. Case C-391/21, *Inspectoratul General pentru Imigrări*, ECLI:EU:C:2022:1020, para. 31.

44 Other language versions also employ wording pointing to non-exhaustiveness, see e.g. *insbesondere* in German, *en particulier* in French, *in het bijzonder* in Dutch, *in particolare* in Italian, etc.

45 See Opinion of AG Cruz Villalón in Case C-364/13, *International Stem Cell*, ECLI:EU:C:2014:2104, para. 33.

46 As also confirmed by the General Court in T-450/12, *Anagnostakis v Commission*, ECLI:EU:T:2015:739, para. 42.

47 In this vein, see Leo Flynn, 'Article 122 TFEU', in: Manuel Kellerbauer (ed.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford, OUP, 2019, p. 1284. See also the Opinion of the Council Legal Service on Next Generation EU, Council Doc. 9062/20, para. 121.

48 See Case C-426/93, *Germany v Council*, ECLI:EU:C:1995:367, para. 21.

49 See Council Regulation 2016/369 on the provision of emergency support within the Union, OJ 2016 L 70/1; Council Regulation 2022/2372 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, OJ 2022 L 314/64.

be granted.[50] While the Court did not elaborate on this finding, this means that 'financial assistance' measures fall outside the notion of 'any appropriate measure', presumable because Article 122(2) TFEU explicitly envisages the grant of financial assistance, thus constituting a *lex specialis*.[51]

As noted above however, to identify the proper meaning of a provision of EU law, one should also take into account the provision's context and the objectives it pursues. The limit here is that 'taking into account context and objectives' cannot have the effect of depriving that provision's clear and precise wording of all effectiveness.[52] Yet, since Article 122(1) TFEU is neither clear nor precise, its ambiguity leaves scope, and requires us, to look at its context and the objectives it pursues. Article 122 TFEU forms part of Chapter 1 of Title VIII of Part III of the TFEU. That chapter is devoted to 'Economic policy'. Measures adopted pursuant to Article 122(1) TFEU should thus be *economic* measures, although this may not be a real limit in itself since it seems difficult and even impractical to draw a clear line between economic and non-economic policy.[53] Crucial nonetheless is that Article 2(3) and Article 5(1) TFEU firmly put economic policy in the hands of the Member States. The latter are to coordinate their policies within the Council (rather than the Council coordinating the economic policies of the Member States).[54] While Article 122(1) TFEU would, from a purely textual perspective, allow the Council to harmonise the Member States' economic policies, as long as the measures adopted are 'appropriate to the economic situation', doing so would run counter to Articles 2(3) and Article 5(1) TFEU.[55] As the Court clarified in *Pringle*, those Articles "restrict the role of the Union in the area of economic policy to the adoption of coordinating measures."[56] At the same time, there is quite some room for the development of economic policy between the extremes of complete harmonisation and mere coordination. It is in this light that we should assess the critique of Leino-Sandberg and Ruffert on Article 122 TFEU developing into a 'super-competence' going beyond Article 352 TFEU,[57] against the presumed intent of the Treaty authors.[58] Apart from the fact that in law, there is no category of 'super-competences', Leino-Sandberg and Ruffert may appear too alarmist since the Court's clarification in *Pringle* prevents the EU from developing a fully-fledged economic policy on the foot of Article 122 TFEU. The latter's vague and open wording (or at least that of its first paragraph) should then be seen as reflecting a clear intent of the Treaty authors to create a flexible legal basis.

While Article 122 TFEU therefore does not constitute a super-competence, it is true, as Keppenne has noted, that notwithstanding the Court's straightforward statement in *Pringle*, "it becomes more and

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[50] Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 116. Later confirmed and arguably broadened in Case C-589/15 P, *Anagnostakis v Commission*, ECLI:EU:C:2017:663, para. 69, where the Court held that Article 122(1) TFEU cannot be used "*to alleviate the severity of a Member State's financing difficulties*."

[51] In this sense also Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 2, p. 445.

[52] See e.g. Case C-181/20, *VYSOČINA WIND*, ECLI:EU:C:2022:51, para. 39.

[53] When the Court in *Pringle* and *Gauweiler* was asked to clarify to distinguish between economic and monetary policy, it held that one and the same measure could be either, depending on the objectives pursued. See Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400, paras 63-64.

[54] See in this vein also View of AG Kokott in Case C-370/12, *Pringle*, ECLI:EU:C:2012:675, paras 91-94.

[55] In this sense also Rüdiger Bandilla, 'Art. 100 EGV', in Eberhard Grabitz & Meinhard Hilf (eds), *Das Recht der Europäischen Union*, München, Beck, EL 31, § 3.

[56] Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 64.

[57] While Leino-Sandberg and Ruffert do not fully elaborate this point, Article 122 TFEU would presumably allow the Council to go beyond what Article 352 TFEU permits since the latter imposes more substantive limits and also prescribes a more demanding decision-making procedure.

[58] Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 2, pp. 447-448.

more difficult to maintain that economic governance is based only on mere coordination."[59] Indeed, assuming that the Court's case law on Article 103(2) EEC is still good law, it should be recalled that the Court held that "by empowering the Council to "decide upon the measures appropriate to the situation", without obliging it to do so, Article 103 conferred on that institution a wide power of discretion to be exercised in accordance with the "common interest"".[60] Combining the latter case law with *Pringle* would suggest that recourse to Article 122(1) TFEU as a legal basis should remain exceptional because that legal basis, on the one hand, allows the Council to adopt far-reaching economic policy measures while, on the other hand, the Member States still remain primarily responsible for their respective economic policies. The main role for the Council in this area then is to help ensure proper coordination between the Member States, with a subsidiary role flowing from Article 122 TFEU. Construing this as the proper role and function of Article 122(1) TFEU would then also be corroborated by the change from unanimous to qualified majority voting introduced by the Nice Treaty. Allowing the Council to adopt appropriate economic policy measures 'in the common interest' is better realised by allowing the Council to decide through qualified majority voting (QMV) rather than unanimity, without this changing the exceptional and residual nature of Article 122(1) TFEU.[61]

The latter, residual, nature of Article 122(1) TFEU has not been discussed yet but further follows from the part of the provision that states that it is 'without prejudice to any other procedures provided for in the Treaties'.[62] That part raises the second interpretative question noted above and will be turned to next.

4.1.2. The legal significance of the 'without prejudice to' clause

In terms of clarity in drafting, 'without prejudice to' clauses are often problematic. It is revealing in this regard that the Council's 2002 Manual of Precedents still endorsed the inclusion of 'without prejudice to' clauses in EU legislation[63] but by 2015, the Joint Practical Guide of the Parliament, Council and Commission considers that "the consequences of references introduced by the words 'without prejudice' are often far from clear. There may, inter alia, be contradictions between the act containing the reference and the act to which reference is made."[64] The fact that it is now advised to avoid 'without prejudice to' in the drafting of secondary legislation highlights the challenge in identifying the proper meaning of the clause figuring in Article 122(1) TFEU. According to the aforementioned Council Manual 'without prejudice' means 'without affecting ...', 'independently of ...', or 'leaving intact ...', meaning that the clause(s) to which is referred remain(s) fully applicable and in case of conflict prevail(s) over the

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59 Jean-Paul Keppenne, 'Economic Policy Coordination', in: Fabian Amtenbrink & Christoph Herrmann (eds), The EU Law of Economic and Monetary Union, Oxford, OUP, 2020, p. 793.

60 See Joined Cases 9 & 11/71, *Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v Commission*, ECLI:EU:C:1972:52, para. 33.

61 See in this vein, Francesco Sciaudone, 'Articolo 100', in: Antonio Tizzano (ed.), Trattati dell'Unione europea e della Communita europea, Milano, Giuffrè, 2004, p. 670.

62 It should be stressed however, that the 'without prejudice to' clause only works horizontally within the Treaties, safeguarding other legal bases (and the prerogatives of the other EU institutions flowing from these legal bases). It does not as such address the concern that Leino-Sandberg and Ruffert have expressed (see note 58) which relates to the vertical, Member State-EU, division of competences.

63 Council of the EU, Manual of precedents for acts established within the Council of the European Union, Fourth Edition, July 2002, p. 142.

64 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, 2015, p. 50.

clause containing the 'without prejudice to' reference.[65] That interpretative rule mainly makes sense where both provisions contain substantive rules, whereby the rule referred to takes precedence over the referring rule. In that sense, Article 122(1) TFEU is atypical since it constitutes a legal basis (referring to the other legal bases in the TFEU) rather than a substantive rule. AG Roemer in the *Balkan Import* case addressed the 'without prejudice to' clause when Article 103 EEC still dealt with conjunctural policy (see Section 3) as follows:

"[O]ne must also consider, before the use of Article 103 in the present case can be justified, whether by means of these expressions it was intended to express, as the plaintiffs […] seem to think, that Article 103 could only be considered for subsidiary purposes […] In this context the Council and the Commission are certainly right in pointing out that the meaning of the term 'without prejudice' is not altogether clear. It certainly could also mean that Article 103 might even be used when there are other provisions in the Treaty that also provide a solution (that accordingly it does not point to a principle of 'subsidiary application' as the Commission called it, but to a principle of 'parallel application'). Furthermore, the [Council and Commission] are right when in the light of this state of affairs they underline the necessity of undertaking a close examination as to the sense and purpose of the provision. For when this is done, one cannot avoid realizing that measures of conjunctural policy have a comprehensive character. That being the case, it appears unthinkable to interpret Article 103 in a way which would suggest that measures of conjunctural policy can only seldom be based upon this provision alone, but rather that other, additional procedural provisions (e.g. provisions in the field of agriculture which require the opinion of Parliament to be obtained) had to be observed. Indeed, such fragmentation of the procedure, rendering it considerably more difficult to apply, is not acceptable in the interests of speedy effectiveness of measures of conjunctural policy. In principle, one ought therefore to take the view that Article 103 can be used independent of other Treaty provisions and parallel to them, provided there is a goal in conjunctural policy to be aimed for."[66]

While the Court itself did not rely on the notion of 'parallel application' of different legal bases, it nonetheless followed the AG in this suggestion. The Court thus held that the measure based on Article 103 EEC *in casu* dealt with problems in the CAP (resulting from currency fluctuations) which in normal circumstances ought to have been adopted pursuant to the legal basis allowing the institutions to develop the CAP. At the same time however, it accepted that a requirement to consult Parliament, required under the CAP legal basis, would have prevented the Council from acting swiftly and hence it was acceptable for the Council to rely on Article 103 EEC on an interim basis.[67] What is then the take home message of this jurisprudence and can it be readily transposed to the current Article 122 TFEU?

Differently from 'without prejudice to' references between substantive rules, the reference in Article 122 TFEU would not provide for an absolute priority to other legal bases. Instead, the legal basis in Article 122 TFEU could at least also be relied on to adopt measures which, given their content and purpose, would come under another legal basis were it not for the context in which they are to be adopted. It is important to note that this assessment would still boil down to an application of the standard legal basis test, albeit that the objective factors of content and purpose would be complemented by that of the context in which a measure is to be adopted. That the 'without prejudice to' clause of Article 122(1) TFEU can be accommodated in such a way is corroborated by the fact that

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[65] See in this vein also Opinion of AG Szpunar in Case C-240/14, *Eleonore Prüller-Frey*, ECLI:EU:C:2015:325, para. 69; Opinion of AG Wahl in Case C-207/13, *Wagenborg Passagiersdiensten BV*, ECLI:EU:C:2014:198, paras 71-75.

[66] Opinion of AG Roemer in Case 5/73, *Balkan Import*, ECLI:EU:C:1973:71, p. 1123.

[67] Case 5/73, *Balkan Import*, ECLI:EU:C:1973:109, para. 15.

the Court, in several cases before it, has already taken into account the context in which the measure was adopted for the purposes of the choice of legal basis test.[68] While the Court has suggested that none of the objective factors prevails over the other,[69] the 'without prejudice to' clause in Article 122(1) TFEU would require the Council to attach special attention to the context in which the measure would be adopted, if that measure could also be adopted pursuant to a different legal basis. Only if the context *necessitates* recourse to Article 122(1) TFEU would that recourse be justified. Urgency of the measure to be adopted, which could present itself also outside emergency situations, is just one possible factor which could define that context. However, to ensure the *effet utile* of Article 122(1) TFEU, recourse to that legal basis should not be *a priori* restricted to situations in which urgent action is required.

One remaining complicating factor compared to the *Balkan Import* case is that the 'conjunctural policy' dimension has been taken out Article 103 EEC by the Maastricht Treaty. This makes it difficult to require recourse to Article 122(1) TFEU to be restricted to temporary measures,[70] as the Court did in *Balkan Import*. Since this carries special importance in relation to the EU Recovery Instrument (EURI) it will be returned to in Section 5.1.

4.1.3. Article 122(2) as a genuine crisis legal basis

Compared to paragraph 1, the second paragraph of Article 122 TFEU presents much less interpretative problems. Differently from paragraph 1, paragraph 2 very clearly constitutes a crisis legal basis that can only be relied on in emergencies. The provision spells out that a Member State must either be in difficulties or must be seriously threatened with severe difficulties. The origin of these difficulties is not relevant,[71] and can be natural disaster or any other exceptional occurrence. The requirement that the Member State concerned cannot control the exceptional occurrences is not to be read as precluding recourse to Article 122(2) TFEU when that Member State has contributed to the difficulties which it faces. Instead, it refers to the nefarious consequences of the difficulties which should be beyond the Member State's control.[72] Linked to the characteristic of Article 122(2) TFEU as a crisis legal basis is the (implicit) feature that measures adopted pursuant to this legal basis should be temporary. While this is not explicit in the paragraph 2 itself, the Court has clarified this in *Pringle*,[73] where it held that the ESM could not have been established pursuant to Article 122(2) TFEU, since the ESM is envisaged to be a permanent mechanism. Finally, Article 122(2) TFEU also makes clear (through the verb 'may') that the decision whether or not to grant financial assistance is wholly within the Council's discretion.[74] Yet,

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[68] See Case C-81/13, *UK v Council*, ECLI:EU:C:2014:2449, para. 38; Case C-482/17, *Czechia v Parliament & Council*, ECLI:EU:C:2019:1035, para. 45. The Court does so, however, without textually adapting its choice of legal basis test along these lines, typically referring only to the objective factors of content and purpose.

[69] See Case C-180/20, *Commission v Council*, ECLI:EU:C:2021:658, para. 33.

[70] See also Rüdiger Bandilla, 'Art. 100 EGV', in Eberhard Grabitz & Meinhard Hilf (eds), Das Recht der Europäischen Union, München, Beck, EL 31, § 3.

[71] See Ulrich Häde, 'Art. 122 AEUV', in: Christian Calliess & Matthias Ruffert, *EUV/AEUV*, München, Beck, 6. Auflage 2022, § 9.

[72] This is particularly clear in the Dutch language version of the provision which does not employ the verb 'control' but rather 'master'.

[73] Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 65.

[74] This also means that while recourse to Article 122(2) TFEU is not precluded when a Member State has itself contributed (or directly caused) the difficulties which it faces but that the Council can effectively refuse to grant assistance in such a situation. In this light it is doubtful that recourse to paragraph 2 would be legally precluded to address a sovereign default caused by unsound budgetary policies as Häde claims, see Ulrich Häde, 'Art. 122 AEUV', in: Christian Calliess & Matthias Ruffert, *EUV/AEUV*, München, Beck, 6. Auflage 2022, § 16.

when financial assistance is granted, it must come with certain conditions.[75] That being said, and as Table 1 makes clear, the threshold for the Council to grant aid has been lowered by the Nice Treaty. Where the original provision introduced by the Maastricht Treaty required the Council to decide by unanimity – unless the difficulties were caused by a natural disaster, in which case assistance could be granted by qualified majority – the Nice Treaty lowered the voting threshold to qualified majority, regardless of the cause of the difficulties.

[75] See also Ulrich Häde, 'Art. 122 AEUV', in: Christian Calliess & Matthias Ruffert, *EUV/AEUV*, München, Beck, 6. Auflage 2022, § 12-13.

5. THE LEGALITY OF RECENT ARTICLE 122 TFEU MEASURES

In this part of the paper, the challenges which recourse to Article 122 TFEU poses for the democratic legitimacy of EU action will be addressed. This will be done in three turns. As noted above, the almost inexistent formal role of Parliament in measures adopted pursuant to the two legal bases in Article 122 TFEU should as such be accepted as a given. That role is the result of a clear and explicit choice of the Treaty authors. Recourse to Article 122 TFEU then only becomes problematic if the legal limits discussed above are not respected (anymore), with the result that the Council is not acting within the limits of the power conferred on it by Article 122 TFEU. Where the Council is doing so in absence of an alternative legal basis in the Treaties, it will be violating the principle of conferral and the prerogatives of the Member States. Where the Council irregularly relies on Article 122 TFEU at the expense of another legal basis in the Treaties, it will (also) be violating the principle of institutional balance insofar as the proper legal basis sets out a different balance of powers between the institutions.[76] Since typically other legal bases foresee a more prominent role for Parliament, at least the latter institution would see its prerogatives– and with it, the democratic legitimacy of EU action – undermined. This possible scenario will be turned to in a first section. Subsequently, where the Council's recourse to Article 122 TFEU is legally valid, Section 6.1 will look into the possibility to improve, under the current Treaty framework, the involvement of the Parliament in the decision-making process. The Section 6.2 will look into possibilities to alter the Treaty framework, granting a more prominent role to Parliament.

Constraints of space do not allow the present section to assess the legality of all the recently adopted measures based on Article 122 TFEU. In addition, the purpose of the present section is also more modest and aims to look into one specific possible irregularity affecting the legality of the measures concerned. Its crux boils down to the question whether the Council has gone beyond what Article 122(1) and (2) allow by adopting measures that should have been adopted pursuant to a different legal basis which prescribes greater involvement by the Parliament (and hence greater democratic legitimacy).

This question will be looked into specifically for three acts, namely the EU Recovery Instrument (EURI) adopted to tackle the economic downturn following the COVID-pandemic,[77] and the regulations on coordinated demand-reduction measures for gas and on an emergency intervention to address high energy prices adopted to tackle the energy crisis following Russia's full-scale invasion of Ukraine.[78] These three measures were selected because precisely their legal basis has been contested by commentators and/or before the EU Courts. For the purposes of the present section, the fundamental legal question for all three instruments is whether the correct legal basis was relied on.

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[76] On the different institutional balances in the EU Treaties, see Merijn Chamon, *The European Parliament and Delegated Legislation - An Institutional Balance Perspective*, Oxford, Hart Publishing, pp. 4-5.

[77] Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ 2020 L 433I/23.

[78] Council Regulation 2022/1369 on coordinated demand-reduction measures for gas, OJ 2022 L 206/1; Council Regulation 2022/1854 on an emergency intervention to address high energy prices, OJ 2022 L 261I/1.

5.1. European Union Recovery Instrument (EURI)

Of the three measures assessed here, the EURI has attracted most scholarly attention.[79] Legally the construction of which EURI forms part looks as follows: First, a new own resources decision (ORD) was adopted which allows the Commission to borrow money to fund EURI and which temporarily increases the own resources ceilings to ensure that the EU will be capable to pay back the sums borrowed.[80] Second, the EURI regulation indicates where the money borrowed should go to, designating most of it to 'a programme financing recovery and economic and social resilience'.[81] Third, the Recovery and Resilience Facility (RRF) Regulation sets out that latter programme in detail.[82] In this three-step setup, Parliament was only really involved in the last step since the RRF Regulation was adopted pursuant to Article 175 TFEU which prescribes the OLP. EURI itself was adopted pursuant to Article 122 TFEU, and the ORD legal basis (Article 311 TFEU) only foresees in the consultation of the Parliament. While this whole set up raises many different legal questions,[83] the main question for the purposes of the present study is whether Article 122 TFEU was rightly relied upon or whether instead, the borrowing and assignment of the funds could also have been made possible through another setup that allows for Parliament's greater involvement and control. As noted above in Section 4, this requires a legal basis test of EURI, whereby the objective factor of the context in which EURI was adopted should carry important weight.

The stated aim of EURI is to provide financial support to the Member States to prevent further deterioration of the economy, employment and social cohesion and to boost a sustainable and resilient recovery of economic activity, in the wake of the pandemic.[84] In terms of content, EURI creates an instrument that finances certain predetermined types of measures. Those measures are, among others, measures to restore employment and job creation, reform and investment measures, measures supporting business and research and innovation measures. All measures must "tackle the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of that crisis."[85] From this, the Council Legal Service (CLS) concluded that the aim and content of EURI thus align with Article 122(1) TFEU. However, there are some important points in the CLS's Opinion which merit further discussion since on some points, the CLS advances an interpretation of Article 122 TFEU which narrows its scope while on other points it broadens the scope again.

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79 See i.a. Francesco Martucci, 'Next Generation EU et la politique de cohésion économique, sociale et territoriale : vers une solidarité dans l'Union', (2023) *Revue du droit de l'Union européenne* 1, pp. 185-196; Caroline Heber, 'Europarechtliche Grenzen für den Wiederaufbaufonds', (2021) 56 *Europarecht* 4, pp. 416-453; Federico Fabbrini, 'Next Generation Eu: Legal Structure and Constitutional Consequences', (2022) 24 *Cambridge Yearbook of European Legal Studies*, pp. 45-66; Bruno De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', (2021) 58 *Common Market Law Review* 3, pp. 635-682; Frank Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts „Next Generation EU"', (2020) *Neue Juristische Wochenschrift* 42, pp. 3085-3091.

80 Council Decision 2020/2053 on the system of own resources of the European Union, OJ 2020 L 424/1.

81 See Article 2(2)(a)(i) and 2(2)(b) of Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ 2020 L 433I/23.

82 Regulation 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility, OJ 2021 L 57/17.

83 Very insightful in this regard is the Opinion of the Council Legal Service on Next Generation EU, See Council of the European Union, Doc. 9062/20.

84 See recital 5 of Regulation 2020/2094.

85 See Article 1(2) of Regulation 2020/2094.

While the CLS does not treat the context in which EURI is adopted as a self-standing objective factor to test, it includes contextual elements in its assessment of the aim and content of EURI. It does so firstly by arguing that although the Commission's proposal (and the Regulation as ultimately adopted) mentions Article 122 TFEU as a legal basis, the specific legal basis is Article 122(1) TFEU since EURI does not grant financial assistance itself.[86] This in itself seems overtly formalistic since it is clear that EURI establishes the instrument that envisages financial assistance to be granted by further measures such as the RRF.[87] At the same time, the CLS finds that both legal bases need to be read together which leads it to find, contrary to the assessment in Section 4.1.1, that the whole Article constitutes an emergency legal basis.[88] Relying on the *Balkan Import* case, the CLS also holds that measures adopted pursuant to Article 122(1) TFEU must be temporary,[89] ignoring the fact that contrary to the original Article 103 EEC, Article 122 TFEU does not merely deal with conjunctural policy. The CLS's restrictive reading of Article 122 TFEU is at the same time offset by its limited emphasis on the 'without prejudice to' clause which introduces Article 122(1) TFEU. On this, the CLS only notes that it "underscore[s] the exceptional and temporary nature of measures under Article 122(1) TFEU, as recourse to that provision may not undermine or circumvent the use of other legal basis laid down in the Treaties for use in "normal times"."[90] By treating Article 122(1) TFEU as a crisis legal basis that can only be relied on to adopt temporary measures (a reading that is arguably too restrictive), the CLS thus assumes that the 'without prejudice to' clause is *ipso facto* respected and it does not return to it, as a separate condition to be met, after having established that EURI constitutes a set of temporary crisis measures.

This approach arguably goes at the expense of Parliament's position, since under the interpretation set out in Section 4.1.2, the 'without prejudice to' clause would require the Commission (in its proposal) and the Council to address the questions whether the envisaged measure could not be adopted pursuant to another legal basis and, if so, whether there is an overriding contextual reason to resort to Article 122 TFEU. Such a reason could indeed be the existence of a crisis, but differently from the CLS's reading of Article 122(1) TFEU a crisis or emergency would not be a condition *sine qua non* for recourse to Article 122(1) TFEU. Specifically for the EURI instrument, which largely channels the money to be borrowed to the RRF, the question to be asked then becomes whether the sectorial legal basis could not have been relied on directly.[91] The RRF Regulation itself could then have empowered the Commission to borrow money and could have qualified the money borrowed for non-repayable support as external assigned revenue for the purposes of Article 21(5) of the Financial Regulation.[92]

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86 Opinion of the Council Legal Service on Next Generation EU, See Council of the European Union, Doc. 9062/20, para. 119.

87 And the financial assistance under instruments like the RRF is directly dependent on EURI. See Bruno De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', (2021) 58 *Common Market Law Review* 3, pp. 654-655.

88 Opinion of the Council Legal Service on Next Generation EU, See Council of the European Union, Doc. 9062/20, para. 121 at footnote 68. Also the German Constitutional Court unconvincingly suggests that both paragraphs need to be read together and this to prevent "an excessively broad reading of Art. 122(1) TFEU." See BVerfG, Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21, para. 185.

89 Ibid., para. 121 at footnote 70

90 Ibid., para. 121.

91 Leino-Sandberg and Ruffert note that EURI would have been "difficult to justify as a stand-alone cohesion policy measure under Article 175(3) TFEU." Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 2, pp. 443-444

92 This also implies that the ORD need not have included an empowerment to the Commission to borrow the money, since the ORD does not qualify the borrowed money as an own resource. According to the CLS, borrowed money could also never qualify as an own resource, see Opinion of the Council Legal Service on Next Generation EU, See Council of the European Union, Doc. 9062/20, para. 78; *contra* see Caroline Heber, 'Europarechtliche Grenzen für den Wiederaufbaufonds', (2021) 56 *Europarecht* 4, pp. 431-432. The amendment of the ORD in the framework of Next

This course of action would come into view when the emphasis on the purpose of the EU's intervention would not be so much on addressing the economic crisis as such but on the strengthening of the EU's economic, social and territorial cohesion, especially following the pandemic.

A further characteristic of the setup of NGEU that militates against Article 122 TFEU as the proper legal basis for EURI is the three-step construction. The simplified decision-making procedure set out in Article 122 TFEU, which for the Court in *Balkan Import* was decisive to accept the appropriateness of relying on Article 103 EEC, could not fully fulfil its function, since the effective implementation of EURI depended on other acts that could not be adopted through such simplified decision-making procedures. While this may put into doubt the recourse to Article 122 TFEU, these reservations do not ultimately mean that EURI was wrongly adopted pursuant to Article 122 TFEU. After all, there are still two elements based on which it can be argued Article 122 TFEU was indeed the proper legal basis. First, there is the consideration that size (legally) matters and that the unprecedented size of support channeled through EURI requires recourse to Article 122 TFEU to ensure consistency with the requirement flowing from Article 125 TFEU that Member States pursue a sound budgetary policy.[93] Secondly, and this may perhaps be more psychological than legal, recourse to Article 122 TFEU would have been necessary because the EURI departs from the long held understanding that the EU cannot borrow for spending,[94] an understanding that was also enshrined in Article 4 of the ORD in 2020 and to which Article 5(1) ORD creates an exception specifically and solely for EURI. While a more limited instrument similar to EURI could therefore arguably have been based directly on Article 175 TFEU,[95] the specific context in which EURI was adopted, whereby an unprecedented response was deemed necessary to tackle the pandemic and the exceptional scale of the borrowing for expenditure, would point to Article 122 TFEU as the proper dual legal basis given the dual aim of providing financial support (Article 122(2) TFEU) and building a sustainable and resilient economy (Article 122(1) TFEU).[96] To ensure full respect for the institutional balance however, it would appear necessary that the Council, when adopting measures based on Article 122(1) TFEU, *explicitly* sets out how recourse to that legal basis does not prejudice any of the other procedures in the Treaties.

Such a specific requirement arguably follows from the general obligation to state reasons in Article 296 TFEU. Under established case law of the Court, the statement of reasons must show the reasoning of the EU authority that adopted the measure clearly and unequivocally, so as to enable any person concerned to ascertain the reasons for the measure, without, however, having to go into every relevant

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Generation EU would therefore only have been necessary to increase the own resources ceiling given the exceptionally high amount of borrowing foreseen.

93 Note that the CLS has argued that NGEU falls outside the scope of Article 125(1) TFEU because differently from the ESM, NGEU would not replace Member States' financing themselves on the capital markets. See Opinion of the Council Legal Service on Next Generation EU, See Council of the European Union, Doc. 9062/20, paras 159–164. While that is true, this does not detract from the fact that the more fundamental purpose of Article 125 TFEU is to require Member States to pursue sound budgetary policy, as clarified by the Court in Pringle (see Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 135) and that the sheer scale of NGEU could take away incentives for Member States to pursue such policy as argued by Wutscher. See Claudia Wutscher, 'When Size Matters', in: Ruth Weber (ed.), The Financial Constitution of European Integration, Oxford, Hart Publishing, 2023, p. 139. See also Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 2, p. 441.

94 See Päivi Leino-Sandberg, 'Who is ultra vires now?', *Verfassungsblog*, 18 June 2020.

95 For the future this is different however, since Article 4 of the ORD now explicitly rules out borrowing for operational expenditure.

96 Contra Leino-Sandberg and Ruffert who claim that the dual legal basis serves to intentionally and instrumentally "obfuscate the exact relation of the measures to Article 122 TFEU." See Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 2, p. 446.

point of fact and law.[97] Given the importance of the 'without prejudice to' clause of Article 122(1) TFEU in upholding the institutional balance, it cannot be regarded as merely a single pertinent legal point, but rather as a fundamental one. Of further relevance here is the jurisprudence of the Court in which it finds a link between the involvement of an actor/person in the decision-making process and the requirement of the duty to state reasons. Where the Member States cannot complain about a general statement of reasons for measures adopted by the Council (since they were involved in the procedure as members of the Council),[98] the specific issue for the Parliament lies in its complete exclusion when measures are adopted pursuant to Article 122 TFEU. Parliament's sidelining would thus reinforce the Council's duty to state reasons.

5.2. The measures adopted to address the energy crisis

Differently from EURI, the Regulation on the coordinated demand-reduction measures for gas (Gas Demand-Reduction Regulation) and the Regulation on an emergency intervention to address high energy prices (Emergency Intervention Regulation)[99] are both based specifically on Article 122(1) TFEU. The present study will zoom in on these two measures among the different measures adopted during the energy crisis because they have also been challenged before the EU courts.[100] However, these challenges will most likely be unsuccessful since, again differently from EURI, the Council's reliance on Article 122 TFEU for the adoption of these measures seems much less legally questionable.

The aim of both regulations is to address the energy crisis, ensuring sufficient supply of gas and electricity and mitigating the rise in prices for gas and electricity. In terms of content, the Gas Demand-reduction Regulation instructs the Member States to voluntarily reduce gas consumption and creates a mechanism allowing the Council to declare a Union alert following which the Member States would be obliged to reduce gas consumption. The Regulation does not prescribe which specific measures should subsequently be adopted but only sets out some conditions which they must meet, such as proportionality, non-discrimination, transparency, etc. The Emergency Intervention Regulation is a more elaborate instrument: it prescribes, inter alia, (i) demand-reduction measures for electricity along the same lines as those in the Gas Demand-reduction Regulation, (ii) a cap on market revenues for electricity producers, (iii) a temporary solidarity contribution to be paid by fossil fuel companies, and (iv) how the revenue from the cap and the solidarity contribution is to be distributed/spent.

These economic measures come within the scope of the 'appropriate measures' which Article 122(1) TFEU foresees and their adoption in response to the energy crisis seems an example *par excellence* of the intended purpose of the legal basis given the severe difficulties which have arisen in the (affordable) supply of gas and electricity. Still, the exceptionally broad conferral of power to adopt (any) appropriate measures is counterbalanced with the 'without prejudice to' clause which needs to be

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97 Case C-122/94, *Commission v Council*, ECLI:EU:C:1996:68, para. 29.

98 Case C-508/13, *Estonia v Parliament & Council*, ECLI:EU:C:2015:403, para. 62.

99 Council Regulation 2022/1369 on coordinated demand-reduction measures for gas, OJ 2022 L 206/1; Council Regulation 2022/1854 on an emergency intervention to address high energy prices, OJ 2022 L 261I/1.

100 See Case C-675/22: Action brought on 2 November 2022 — Poland v Council, OJ 2023 C 7/18; Case T-759/22: Action brought on 2 December 2022 — Electrawinds Shabla South EAD v Council, OJ 2023 C 71/32; Case T-775/22: Action brought on 12 December 2022 — TJ e.a. v Council, OJ 2023 C 54/19; Case T-802/22: Action brought on 28 December 2022 — ExxonMobil v Council, OJ 2023 C 54/23; Case T-795/22: Action brought on 20 December 2022 — TV and TW v Council, OJ 2023 C 54/20; Case T-803/22: Action brought on 30 December 2022 — TZ v Council, OJ 2023 C 63/64.

taken into account when assessing the choice of legal basis. And just like the EURI Regulation, the Gas Demand-Reduction Regulation and Emergency Intervention Regulation do not, in their preambles, engage properly with that clause. The legal basis question also appears to be a major point in the cases lodged against both regulations. Poland has thus challenged the Gas Demand-Reduction Regulation, while several energy companies have challenged the Emergency Intervention Regulation. Since these cases are pending before the Court of Justice and the General Court, the only public information available is to be found in the notices published in the OJ.

In terms of legal basis challenges, it transpires from these notices that according to Poland a wrong legal basis was used for the Gas Demand-Reduction Regulation because the main objective of that regulation is to have a significant effect on the conditions for exploiting energy resources, the choice between different energy sources and the general structure of a Member State's energy supply. According to Poland, since the regulation significantly affects the freedom to shape the energy mix, it should have been adopted on the basis of Article 192(2)(c) TFEU. This legal basis prescribes a SLP in which the Council, and this is of course crucial for Poland, has to decide with unanimity. However, recourse to Article 192(2)(c) TFEU would also affect the position of the Parliament since pursuant to that legal basis, Parliament is at least consulted.

While not all of the energy companies challenging the Emergency Intervention Regulation seem to challenge the legal basis of the Regulation,[101] those that do typically argue that the regulation contains fiscal measures and that therefore a SLP should have been followed. Those companies thereby presumably refer to Article 194(3) TFEU.[102] Finally, one of the companies does not focus so much on the alleged fiscal nature of the measure but argues that Article 122 TFEU should have a very limited scope precluding the Council from adopting energy crisis management measures, juxtaposing such measures with the power to intervene in the event of severe difficulties in the supply of certain products, including energy, which has been conferred on the Council.[103]

While none of the above actions would appear to have merit (in so far as the legal basis is contested), the case brought by Poland does offer an opportunity for the Court to further clarify the requirements of recourse to Article 122 TFEU. By contrast, it is highly doubtful that the cases lodged before the General Court will even be admissible. Acts adopted pursuant to Article 122(1) TFEU are (non-legislative) regulatory acts,[104] for which non-privileged parties will either have to show they are individually and directly concerned or that they are directly concerned by them and that they do not require implementing measures. Both the cap on market revenues and the temporary solidarity contributions require implementing measures by the Member States. Furthermore, in the concretisation of both measures, Member States enjoy a degree of discretion,[105] which suggests that energy companies' legal position is not affected by the regulation itself.[106] Finally, the individual energy

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[101] In *TV and TW v Council* this argument does not appear in the pleas mentioned in the notice. In *Exonmobil v Council* the applicant merely argues that Article 122(1) is an invalid legal basis.

[102] See TJ e.a. v Council and TZ v Council.

[103] See Electrawinds v Council.

[104] The regulation lays down generally applicable principles, applies to objectively defined situations and produces legal effects for persons determined in an abstract manner. See Case T-94/10, *Rütgers v ECHA*, ECLI:EU:T:2013:107, para. 57

[105] Although that case dealt with a directive and not a regulation, the General Court noted that the specific way in which Member States define the obligations established by an EU act precludes the EU act from directly affecting applicants in Case T-530/19, *Nord Stream AG v Parliament & Council*, ECLI:EU:T:2020:213, para. 39.

[106] Pursuant to established jurisprudence, the requirement of direct concern "requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely

companies do not seem to be individually concerned, since they do not even constitute a closed class.[107]

Insofar as the substantive argument of the energy companies is that the Emergency Intervention Regulation ought to have been adopted based on Article 194(3) TFEU, it would give the General Court the opportunity to clarify the meaning of the notion of 'measures that are primarily of a fiscal nature'. Such measures in the field of energy cannot be based on Article 194(2) TFEU, similarly to environmental measures of a primarily fiscal nature that cannot be based on Article 192(1) TFEU but must instead be based on Article 192(2) TFEU. While this provision ought to be viewed as an exceptional clause to be interpreted restrictively,[108] the EU Courts have not yet clarified this part of Article 192(2) TFEU. The latter must arguably be distinguished from the provision in Article 114(2) TFEU which excludes reliance on Article 114(1) TFEU for *any* 'fiscal provisions'.[109] The same does not apply to Article 194(2) TFEU (or Article 192(1) TFEU) which may be relied on to adopt fiscal provisions, as long as these are incidental and the measures concerned are not *primarily* of a fiscal nature.[110] Applied to the Emergency Intervention Regulation, it is difficult to argue that the regulation is primarily fiscal in nature if the latter is determined not by the type of measure prescribed but by its purpose.[111] Indeed, the Emergency Intervention Regulation's aim is not to generate government revenue but to mitigate the effects of high energy prices. Recourse to Article 122(1) TFEU then appears justified, not in the least because the Commission has already proposed to incorporate elements of the regulation in the EU's proper energy acquis.[112] In *Balkan Import*, the Court stressed this as a feature indicating proper recourse to Article 122 TFEU.

Turning to the case lodged by Poland, it must be noted that it will probably not face admissibility problems given that Member States are privileged applicants under Article 263 TFEU. On the merits however, Poland's plea in relation to the legal basis will fail. Essentially Poland argues that Article 192(2) TFEU ought to have been relied on because the gas demand-reduction measures significantly affect Member States' choice between different energy sources and the general structure of their energy supply. However, the Court has already clarified that Article 192(2), point c) TFEU only comes into play when the *primary outcome sought* by the measure concerned is to significantly affect the choice between energy sources and the general structure of a Member State's energy supply.[113] That does not seem to be the case of the contested regulation which merely aims to solve difficulties in the supply of

automatic and resulting from the EU rules alone without the application of other intermediate rules." See Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori Srl v Commission*, ECLI:EU:C:2018:873 , para. 42.

[107] That the energy companies subject to the solidarity contribution or revenue cap were identifiable when the regulation was adopted is not sufficient to qualify those companies as individually concerned, see Case T-646/20, *NG v Parliament & Council*, ECLI:EU:T:2021:498, para. 47.

[108] See by analogy Case C-5/16, *Poland v Parliament & Council*, ECLI:EU:C:2018:483, para. 44.

[109] On the latter, see Joined Cases C-80/18 to C-83/18, *UNESA*, ECLI:EU:C:2019:934, paras 48-51.

[110] See Christian Calliess, 'Art. 192', in: Christian Calliess & Matthias Ruffert, *EUV/AEUV*, München, Beck, 6. Auflage 2022, § 29; Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities', in: Marjan Peeters & Mariolina Eliantonio (eds), Research Handbook on EU Environmental Law, Cheltenham, Edward Elgar, 2020, p. 14.

[111] See, by analogy, Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400, paras 63-64.

[112] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design, COM(2023) 148 final. Concretely the Commission proposes to improve the Union's electricity market design by amending Regulation 2019/943, pursuant to Article 194(2) TFEU. The amendment would introduce market based instruments to reduce electricity demand and would give the Commission (rather than the Council) the power to declare an electricity price crisis.

[113] Case C-5/16, *Poland v Parliament & Council*, ECLI:EU:C:2018:483, para. 46.

gas. The fact remains, however, that the regulation does not explicitly spell out how it conforms to the 'without prejudice to' clause of Article 122(1) TFEU and how recourse to that legal basis is permissible given the EU's specific competence in the field of energy pursuant to Article 194 TFEU. As noted above, this a question of compliance with the duty to state reasons under Article 296 TFEU and this requirement must be checked *ex officio* by the EU Courts.[114] The Court could therefore go into this question regardless of the pleas advanced by Poland. Taking a principled stance, the Court could then even uphold the action but maintain the effects of the regulation as definitive,[115] since, in any event, the regulation is only to apply until 31 March 2024.[116]

5.3. Proper, but insufficiently reasoned, recourse to Article 122 TFEU

Summarising the above two sections, the recourse by the Council to Article 122 TFEU to adopt measures combatting the energy crisis and to address the economic downturn caused by the pandemic appears legally acceptable. The measures adopted indeed seem properly based on Article 122 TFEU. Still, it does appear problematic that the Council does not explicitly motivate its measures on their compatibility with the 'without prejudice to' clause in Article 122(1) TFEU. While this is partially compensated by the conceptualisation of Article 122(1) TFEU as a temporary crisis legal basis (if we can assume that the Council shares the view of its Legal Service), that conceptualisation seems erroneous when we consider paragraphs one and two in Article 122 TFEU as constituting two separate legal bases. The proper way to ensure a sufficient delimitation of Article 122(1) TFEU, and concomitantly the proper way of ensuring respect for the institutional balance, would instead seem to be to take the 'without prejudice to' clause more seriously. Recourse to Article 122(1) TFEU would then not be limited to the adoption of temporary measures in crisis situations but it would require the Council to explicitly address why recourse to Article 122(1) TFEU is really necessary, despite the existence of alternative legal bases in the Treaties (those being, for EURI and the energy crisis measures, Articles 175 and 194 TFEU). Such an approach would not require the EU Institutions (including the Court) to treat recourse to Article 122(1) TFEU much differently from how legal basis problems are typically dealt with. Indeed, the Court's established choice of legal basis test can be applied without much adaptation, since the Council would have to refer to the typical objective factors informing the choice of legal basis, complemented by the third objective factor of the context in which the measure is adopted. As noted above, the Court, at the occasion of other legal basis disputes, has already integrated that third factor in its test.

Since the choice of legal basis test for the measures discussed in Sections 5.1 and 5.2 indeed points to Article 122 TFEU (although the Council has arguably insufficiently reasoned this choice), it is doubtful whether the recently lodged challenges against some of the measures adopted to address the energy crisis will be successful. While the cases lodged by a number of energy companies would in any event seem to fail on their admissibility, the case brought by Poland should proceed to an assessment of the

[114] Case C-382/12 P, *MasterCard Inc. v Commission*, ECLI:EU:C:2014:2201, para. 155.

[115] See e.g. Case C-166/07, *Parliament v Council*, ECLI:EU:C:2009:499, paras 70-75.

[116] See Council Regulation 2023/706 amending Regulation 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation, OJ 2023 L 93/1.

merits and will give an opportunity to the Court to spell out more clearly to the Council how it should justify its reliance on Article 122(1) TFEU.

6. BOLSTERING THE DEMOCRATIC LEGITIMACY OF ARTICLE 122 TFEU MEASURES

While Section 5 above has shown that the recent recourse to Article 122 TFEU is legally defensible, this does not imply that the democratic legitimacy of the decision-making pursuant to that provision cannot be further improved. Before looking into a Treaty change (see Section 6.2), it is useful to try and develop solutions within the current primary law framework.

6.1. Improving legitimacy under the current Treaties

Put differently, strengthening the democratic legitimacy of Article 122 TFEU measures by increasing Parliament's involvement must respect the institutional balance that transpires from Article 122 TFEU. This section will demonstrate that there already exists institutional practice to this effect and it will indicate how this practice can be further built upon. Specifically, there are three main avenues that seem worth exploring: (i) greater attention on the part of the Council for the 'without prejudice to' clause; (ii) ensuring Parliament's indirect involvement as part of the budgetary authority; (iii) generalisation of the facultative consultation of the European Parliament.

6.1.1. Taking the 'without prejudice to' clause seriously

The most straightforward avenue for improving Parliament's institutional position stems from Section 4.1.2. As noted in Section 5.3, the Commission (in its proposals) and the Council (in the final acts adopted) do not explicitly and properly engage with the 'without prejudice clause' of Article 122(1) TFEU. As noted in the same section, the CLS's interpretation of Article 122(1) TFEU as a crisis legal basis for temporary measures partially forestalls institutional balance problems, but this unduly restricts the scope of the legal basis. Instead, as previously noted, it appears more appropriate to accept the exceptionally broad potential scope of Article 122(1) TFEU. This entails ensuring respect for the institutional balance, and Parliament's prerogatives pursuant to other legal bases in the Treaties, by giving due consideration to the 'without prejudice to' clause. The impact of this would of course be modest, merely leading to an explicit statement of reasons on this matter. However, the inhibiting effect which flows from this requirement may already go a long way in discouraging the (Commission and) Council from being tempted to unduly rely on Article 122(1) TFEU.

There are of course different ways in which such a result may be achieved: Through informal contacts, Parliament might persuade the Commission or Council to change practice, convincing the other Institution to explicitly engage with this clause when acting pursuant to Article 122(1) TFEU. This could also be taken up under the 2016 Interinstitutional Agreement on Better Law-Making since its provides that "[t]he Commission shall provide, in relation to each proposal, an explanation and justification to the European Parliament and to the Council regarding its choice of legal basis and type of legal act in the explanatory memorandum accompanying the proposal."[117] Parliament could put this up for

[117] See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123/1, para. 25. While this paragraph comes under section IV devoted to

discussion in the Interinstitutional Coordination Group and further take it up at a political level.[118] If agreement can be found between the three institutions on the need for an explicit statement of reasons in light of the 'without prejudice to' clause for acts adopted pursuant to Article 122(1) TFEU, that agreement can of course also be codified in a revised Interinstitutional Agreement (IIA) on Better Law-Making. Alternatively, if no consensus can be found between the three institutions, Parliament and Commission could concretely implement their special partnership,[119] and come to a shared Parliament-friendly understanding of the 'without prejudice to' clause in Article 122(1) TFEU.

If formal or informal arrangements cannot be reached with the Commission and/or the Council, Parliament could, at a next occasion, bring the matter before the Court of Justice. As noted above, the case lodged by Poland against the Gas Demand-Reduction Regulation already provides an opportunity to the Court, should it (wish to) take it. While this does not seem very politically realistic or expedient, Parliament could force the matter by bringing an action for annulment itself.[120]

6.1.2. Leveraging Parliament's budgetary powers

A second avenue to ensure Parliament's greater involvement in the adoption of the measures based on Article 122 TFEU is through the leveraging of its budgetary powers. While this arrangement is already in place pursuant to an IIA between Parliament, Council and Commission, this section will illustrate the constraints on its scope, ultimately revealing its inadequacy as a substitute for any genuine parliamentary participation in the decision-making process.

Two IIAs are important to mention here, both of which were agreed on between the three Institutions on 16 December 2020. The first is the IIA that is typically agreed on at the occasion of the adoption of a new multiannual financial framework (MFF).[121] The IIA for the 2021–2027 MFF contains important rules on the expenditure under NGEU.[122] Since the non-repayable support channeled through EURI is external assigned revenue,[123] it is not processed through the budgetary procedure laid down in Article

'legislative instruments', it is assumed that it also applies to autonomous executive acts and not only to legislative acts in the sense of Article 289 TFEU.

[118] See IIA on Better Law-Making, para. 50.

[119] See Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47, para. 1.

[120] While the Parliament does not shy away from using judicial proceedings before the EU Courts for political purposes, recent practice related to the conditionality regulation suggests (anecdotally) that it may not put the question of its institutional prerogatives and the proper interpretation of Article 122(1) TFEU before the Court. When, for instance, the European Council, arguably manifestly, overstepped its powers by intruding in the legislative sphere, the Parliament decided against bringing an action for annulment. Concretely, the Committee on Constitutional Affairs had queried whether annulment proceedings could be brought against the European Council's conclusions of 10 and 11 December 2020, but the Committee on Legal Affairs decided against bringing proceedings. See Minute of the JURI Committee of 23 February 2021, JURI_PV(2021)0223_1, point 9. Conversely, when the Commission did not immediately apply the conditionality regulation, the Parliament did initiate an action for failure to act, although that action was arguably manifestly meritless. See Case C-657/21, *Parliament v Commission* (removed from the register).

[121] For the previous one, see Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, OJ 2013 C 373/1.

[122] See part H of Annex I of Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ 2020 L433I/28.

[123] See Article 3(1) of Regulation 2020/2094.

314 TFEU.[124] As explained in an earlier study for the European Parliament by Begg et al. "the use of these revenues comes under Parliament's scrutiny only at the discharge stage, when the accounts are closed (i.e. with a lag of two years). Such a lack of parliamentary involvement could be considered tolerable while the aggregate level of EAR was marginal, but becomes problematic now that they represent a large, and potentially growing, percentage of EU-level expenditure."[125] To remedy this, the IIA provides for an ongoing control by Parliament and the Council to complement the *ex post* control which they exercise in the discharge phase of the budgetary cycle. Still, the IIA primarily foresees a right of information for Parliament and the Council, along with the Commission's commitment to take utmost account of any remarks made by the two Institutions.

The second IIA concluded on 16 December 2020 is a forward-looking Joint Declaration addressing possible future measures based on Article 122 TFEU:[126] The three Institutions agree that where the adoption of an Article 122 TFEU measure would have appreciable implications for the EU budget,[127] Parliament and the Council must be involved in their capacity as the two arms of the EU's budgetary authority. Concretely, the Joint Declaration sets out that when the Commission adopts a proposal pursuant to Article 122 TFEU, it will include a budgetary assessment of the impact of its proposal. Parliament and the Council can then enter into discussions within a Joint Committee (also involving the Commission) to find an agreement on the proposal's budgetary impact. The discussions should be finalised within two months, but they do not suspend the decision-making procedure since the Council can proceed depending on the urgency of the matter.

Since its adoption, the procedure laid down in the Joint Declaration was triggered once, at the occasion of the Commission's proposal on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level.[128] The Commission adopted this proposal on 16 September 2021, and on 25 October 2021, the Parliament President sent a letter triggering the Joint Declaration's procedure.[129] Following the finalisation of the procedure, the Chair of the Budgetary Committee reported back to Parliament's Conference of Presidents on the concrete outcome. Between Parliament and the Council, there seems to have been an agreement that the measure would not have an immediate significant budgetary impact since that would only arise of the mechanism created if the regulation would actually be triggered. Secondly, the Chair suggested that Parliament should determine a standard format through which to engage in the Joint Committee.[130] During the energy crisis, on the other hand, the procedure was not triggered. While

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[124] See Richard Crowe, 'The European Budgetary Galaxy', (2017) 13 *European Constitutional Law Review* 3, p. 441.

[125] Ian Begg et al., 'The Next Revision of the Financial Regulation and the EU Budget Galaxy', Study requested by the BUDG committee, PE 721.500 - March 2022, p. 26.

[126] See Joint declaration of the European Parliament, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ 2020 CI 444/5.

[127] The Joint Declaration is therefore specific to Article 122 TFEU but follows the same spirit as the 1975 Joint Declaration which instituted a similar mechanism after Parliament's budgetary powers were increased but its role in the decision-making on substantive EU policies was as marginal as in 1958. See Joint Declaration of the European Parliament, the Council and the Commission concerning the institution of a conciliation procedure between the European Parliament and the Council, OJ 1975 C 89/1.

[128] See European Commission, Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM(2021) 577 final.

[129] See point 9 of the State of Play regarding Council Regulation on the emergency framework regarding medical countermeasures in Council Doc. 15132/21, p. 4.

[130] See point 2.9 of the Coordinators' Decisions of 21 June 2022 annexed to the Minutes of the Committee on Budgets' meeting of 11 July 2022, BUDG_PV(2022) 0711_1. Further, the coordinators in the Committee on Budgets have noted that Parliament should put in place more appropriate fast track procedures to ensure the proper functioning of the procedure

some of the energy crisis measures have a very real financial impact, they do not require funding from the EU budget and will therefore have a negligible (if any) repercussions for the EU budget.

In terms of safeguarding Parliament's budgetary prerogatives, the importance of these two IIAs should not be downplayed. However, as suggested above, the limited scope of these IIAs – and their limited potential to allow Parliament to weigh on the decision-making – cannot be disregarded either. In terms of scope, both IIAs are first and foremost budgetary IIAs. Thus, when a proposal pursuant to Article 122 TFEU has no potential appreciable budgetary implications, the procedure of the Joint Declaration cannot even be triggered, regardless of the substantive content of the proposal. Even where the mechanism may be triggered, it should be clear that not every policy issue is a budgetary issue. Further, the mechanisms under both IIAs merely seem to manifest the principle of sincere cooperation in the sense that they seek to ensure the two arms are properly informed – or at least informed to the best of the Commission's ability – about the budgetary implications of NGEU or future Article 122 TFEU measures. Yet, this is no alternative to Parliament's actual *participation* in the decision-making on Article 122 TFEU measures. Finally, it may be possible for Parliament to use the IIAs to (informally) acquire a say over the substance of policies developed pursuant to Article 122 TFEU, but that would imply an improper use of the IIAs. Practice in other areas has indeed shown that where Parliament lacks proper control powers it may try to use its budgetary powers to achieve substantive policy outcomes.[131] However, it does not seem advisable to use budgetary mechanisms, such as e.g. the discharge procedure or the two IIAs *in casu*, to address policy questions with limited budgetary implications.

6.1.3. Generalising the practice of facultative consultations

Given the limited scope and purpose of the two IIAs discussed in the previous section, the third avenue for bolstering Parliament's position in the decision-making pursuant to Article 122 TFEU appears more sound from both a legal and a governance perspective. This third avenue would consist of a generalisation of an already existing practice of consulting Parliament on a facultative basis.

Indeed, only looking at some of the measures adopted pursuant to Article 122 TFEU in the past reveals that, while that legal basis has never prescribed the consultation of Parliament, the Council at times did formally ask Parliament to give its opinion. An example is Council Directive 2004/67 concerning measures to safeguard security of natural gas supply.[132] The first measure adopted pursuant to Article 122 TFEU where the Council sought the opinion of Parliament was Council Directive 68/414 imposing

established by the Joint Declaration. See Point 2.4 of the Coordinators' Decisions of 31 January 2023 annexed to the Minutes of the Committee on Budgets' meeting of 9 February 2023, BUDG_PV(2023)0209_1.

[131] For instance, for the financial year 2020, the Parliament refused to grant discharge to the European Border and Coast Guard Agency. See Decision 2023/325 of the European Parliament, OJ 2023 L 45/13. The reasons set out in the accompanying resolution are arguably not all budgetary in nature. See Resolution 2023/326 of the European Parliament, OJ 2023 L 45/15. The Parliament using the discharge procedure to denounce non-budgetary problems is the direct result of the flawed accountability regime applicable to Frontex (and EU agencies in general). Put differently, when the only power of control you have is that of budgetary control, every problem becomes a budgetary problem.

[132] Council Directive 2004/67 concerning measures to safeguard security of natural gas, OJ 2004 L 127/92. In accordance with the 'without prejudice to' clause, that Directive has been replaced with a Regulation based on Article 194(2) TFEU, see Regulation 994/2010 of the European Parliament and of the Council concerning measures to safeguard security of gas supply, OJ 2010 L 295/1.

an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products.[133]

The Council's practice of consulting Parliament in instances where this is not prescribed by the Treaties goes back to the early 1960's.[134] While Parliament thereby managed to extend its powers,[135] this ultimately depended on the discretion of the Council,[136] since these consultations were on a 'facultative' basis.[137]

Although the notion of 'legislative' acts was only formally introduced into EU law by the Treaty of Lisbon (see Section 2.1.1), there was an informal undertaking by the Council to consult Parliament on a facultative basis on such acts, understood as acts setting out a policy,[138] excluding those acts that were of minor importance, that were confidential or that needed to be urgently adopted.[139] While these facultative consultations might raise questions in terms of their compliance with the institutional balance, the conclusion by Schaub in 1971 that they do not upset the institutional balance still holds: the possibility for the Council to ask for Parliament's opinion can be said to be part of the possibility for that Institution to be heard by Parliament under the current Article 230 TFEU.[140] Unsurprisingly, Parliament attempted to persuade the Council to elaborate a list of legal bases which do not require Parliamentary consultation but where the Council would nonetheless *ex ante* commit itself to asking Parliament's input. Equally unsurprisingly, the Council never accepted that invitation.[141]

However, such a list, set out in an IIA between Parliament and the Council (and possibly including the Commission) would be a legally feasible solution to enhance Parliament's involvement in EU policy making. Of course an IIA could even focus exclusively on measures adopted pursuant to Article 122 TFEU, whereby the Council agrees that by default it will consult Parliament, unless measures need to be adopted extremely urgently. The latter is very relevant in light of the measures recently adopted to

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[133] Council Directive 68/414 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, OJ 1968 L 308/14.

[134] See Conseil des Communautés européennes, Déclaration concernant le renforcement des pouvoirs de l'Assemblée faite par le Ministre LUNS au cours de la session du Conseil de la CEE des 30 novembre et 1er décembre 1964, Doc. 1622/64, p. 3 ; Parlement européen, Rapport sur les compétences et les pouvoirs du Parlement européen, Rapporteur M. Hans Furler, Documents de séances, Doc. 31/65, para. 59.

[135] Already early on, the European Parliament has claimed a power of consultation even in those cases were this was not provided for by the Treaties. See e.g. Parlement européen, Résolution sur les compétences et les pouvoirs du Parlement européen, OJ 1963, p. 1916, point II a) 8. See again, Parlement européen, Résolution sur les problèmes juridiques de la consultation du Parlement européen, OJ 1967, 268/7.

[136] See Jean-François Picard, 'Les pouvoirs du Parlement européen', (1977) Pouvoirs - Revue française d'études constitutionnelles et politiques 2, p. 49.

[137] See Anne Marie Houdbine & Jean Raymond Verges, *Le Parlement européen dans la construction de l'Europe des six*, Paris, Presses Universitaires de France, 1966, p. 66. The acts based on the original Article 103 EEC, like Directive 68/414, dealt mainly with the EEC's embryonic energy policy following the Protocol on Energy Problems of 21 April 1964, see Conseil, Protocol d'accord relative aux problèmes énergétiques intervenu entre les gouvernements des États membres des Communautés européennes, à l'occasion de la 94e session du Conseil spécial de ministres de la Communauté européenne du charbon et de l'acier tenue le 21 avril 1964 à Luxembourg, OJ 1099/64.

[138] European Parliament, Resolution on Relations between the European Parliament and the Council, OJ 1981 C 234/52, point 15.

[139] See Christoph Sasse, 'Le renforcement des pouvoirs du Parlement et spécialement ses nouveaux pouvoirs budgétaires', in Le Parlement européen : pouvoirs, élection, rôle futur : actes du huitième Colloque de l'I.E.J.E. sur les Communautés européennes organisé à Liège, les 24, 25 et 26 mars 1976, Liège, Institut d'études juridiques européennes, 1976, p. 28.

[140] See Alexander Schaub, Die Anhörung des Europäischen Parlaments im Rechtsetzungsverfahren der EWG, Berlin, Duncker & Humblot, 1971, pp. 66-67.

[141] See Olivier Renard-Payen, 'La fonction consultative du parlement européen dans le cadre du traité instituant la Communauté Economique Européenne', (1965) 1 Revue trimestrielle de droit européen 4, pp. 531-532.

tackle the energy crisis. While these measures were arguably urgent, for at least one of these measures the decision-making in Council took so long that there was time for Parliament to be consulted.[142]

Finally, adopting an IIA for this purpose would also be compatible with primary law. While the EU institutions cannot amend the Treaties through IIAs, it is possible to add onto Treaty law.[143] That would be the case here, since the Council would allow Parliament to formally present its view, without as such altering the procedure prescribed by Article 122 TFEU.[144] The procedure would not be altered as such, since the Council retains the option to adopt measures without Parliament's involvement and an agreement (between Council and Parliament) to introduce a facultative consultation would not come with the requirements applicable under obligatory consultation. Thus, the consultation of Parliament would not become an essential procedural requirement,[145] and differently from procedures with obligatory consultation, the Council would not be required to reconsult Parliament in case the proposal is substantially amended after the initial (facultative) consultation.[146] From an institutional balance perspective, Parliament's involvement would also not go at the expense of the prerogatives of another institution, making it less suspect than previous cases where ad hoc decision-making procedures were elaborated by the institutions.[147] Similarly to the possibility of establishing a shared understanding of the 'without prejudice to' clause in Section 6.1.1, if Parliament cannot come to an agreement with the Council, it could aim for a solution within its Framework Agreement with the Commission. Parliament and Commission could for instance agree that for proposals based on Article 122 TFEU, the Commission 'involves Parliament in such a way as to take Parliament's views into account as far as possible, in particular to ensure that Parliament has the necessary time to consider the Commission's proposal.'[148]

6.2. Altering the Treaty framework to improve democratic legitimacy of Article 122 TFEU measures

Finally, and although this avenue seems the least realistically feasible in the short to mid-term, the legally most sound way to bolster Parliament's role in the adoption of Article 122 TFEU measures is to amend the Treaties.

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[142] See Regulation 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders which took two months to adopt from the date the Commission submitted its proposal.

[143] See Bart Driessen, 'Interinstitutional conventions and institutional balance', (2008) 33 *European Law Review* 4, p. 562. Driessen thereby notes specifically in relation to the Council's practice to consult the Parliament on a facultative basis to be "perfectly possible and most often useful".

[144] It is established case law that the institutions cannot break free from the rules laid down in the Treaties by having recourse to alternative procedures. See Case C-27/04, *Commission v Council*, ECLI:EU:C:2004:436, para. 81.

[145] Case 138/79, *Roquette Frères v Council*, ECLI:EU:C:1980:249, paras 33-37 would thus not be applicable by analogy.

[146] Case C-65/90, *Parliament v Council*, ECLI:EU:C:1992:325, paras 20-21..

[147] See Case 68/86, *UK v Council*, ECLI:EU:C:1988:85, para. 38; Case C-133/06, *Parliament v Council*, ECLI:EU:C:2008:257, paras 52-61. In first case, the Council had prescribed unanimity voting, deviating from majority voting which goes at the expense of the Commission's prerogatives (under current Article 293(1) TFEU). In the second case, the Parliament's prerogatives were affected since the Council, instead of following the co-decision procedure, created an alternative procedure whereby Parliament was consulted.

[148] See by analogy, Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47, para. 40(i). In the Framework Agreement this arrangement is foreseen for those special legislative procedures (and non-legislative procedures) which merely prescribe the consultation of the Parliament.

Article 48 TEU provides for different procedures to amend the Treaties, but not all are available *in casu*. Thus, the simplified revision procedures under Article 48(7) TEU cannot be relied upon. The procedure under the first subparagraph of Article 48(7) TEU allows the European Council to change unanimity voting in the Council to qualified majority voting, but Article 122(1) and (2) already prescribe qualified majority voting. The procedure under the second subparagraph of Article 48(7) TEU allows a special legislative procedure to be turned into the ordinary legislative procedure. However, as mentioned in Section 2.1.1, though the procedures outlined in Article 122 TFEU might resemble special legislative procedures, they are not qualified as such. Hence, they do not fall under the (potential) scope of Article 48(7), second subparagraph TEU. Conversely, the conditions for recourse to the simplified revision procedure set out in Article 48(6) TEU would be met. Article 122 TFEU forms part of Part Three of the TFEU, and by merely modifying the decision-making procedures within Article 122 TFEU, the EU's competences would not be expanded.

Evidently, the ordinary revision procedure set out in 48(2–5) TEU could also be relied upon. While there does not seem to be an appetite for this among most Member States, Parliament itself is pressing on for Treaty revision in the wake of the Conference on the Future of Europe.[149] In its Resolution on the call for a Convention for the revision of the Treaties, Parliament noted that its Committee on Constitutional Affairs (AFCO) would prepare proposals for Treaty amendments.[150] Within the AFCO Committee, the preparation of these proposals has been entrusted to a group of five rapporteurs headed by MEP Verhofstadt,[151] whose work is still ongoing at the moment of finalising this study. However, two other committees have made suggestions specifically on Article 122 TFEU. Thus, the Committee on Economic and Monetary Affairs has called "for a revision of Article 122 TFEU that would guarantee a fairer democratic representation, including by involving Parliament on an equal footing,"[152] while the Committee on the Budgets makes two suggestions: Firstly, it wants the OLP to be prescribed under Article 122 TFEU to adopt any temporary measures to address severe or exceptional economic situations.[153] Secondly, it proposes to insert a new Article 122a TFEU prescribing the OLP "to allow the establishment of a permanent special instrument over and above the ceilings of the multiannual financial framework for the Union budget to better adapt and quickly react to crises and their social and economic effects."[154] While any of these amendments to Article 122 TFEU are legally possible, and while Parliament has already in the past demonstrated that it can act swiftly under the OLP when needed, it would appear more appropriate to prescribe in both paragraphs of Article 122 TFEU recourse to a special legislative procedure involving Parliament's consent. Alternatively, and to allow immediate action in genuine emergency situations, one could also think of a procedure allowing the Commission to adopt necessary emergency response measures which only remain valid if they are confirmed, within a pre-determined time window, by Parliament and Council. Absent such confirmation, the measures would be immediately abrogated (without the abrogation having retro-active effect).[155]

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[149] See Politico, Brussels Playbook - Parliament's Federalist Push, 19 July 2023.

[150] See point 3 of the Resolution, OJ 2022 C 493/130.

[151] See the ongoing Legislative initiative procedure 2022/2051(INL).

[152] See point 13 of the suggestion in the Opinion of the ECON Committee for the AFCO Committee of 2 February 2023, PE736.556.

[153] See point 5 of the suggestion in the Opinion of the BUDG Committee for the AFCO Committee of 13 February 2023, PE739.657.

[154] Ibid., point 6.

[155] For similar mechanisms prescribing the legislative confirmation of executive measures, see Article 77 of the Italian Constitution; Article 38 of the French Constitution.

7. CONCLUSION

This study has assessed the recent surge in the reliance by the Council of the legal bases in Article 122 TFEU. To do so, the peculiar nature of Article 122 TFEU, containing non-legislative legal bases, was first properly set out, and the historic evolution of the Treaty Article since its introduction by the Rome Treaties was presented. Looking into the historical reliance on Article 122 TFEU revealed that the recent surge is actually very modest in quantitative terms.

In qualitative terms however, some of the recently adopted 'Article 122 TFEU measures' can be considered as paradigm-changing, which explains Parliament's concern regarding the Council's reliance on Article 122 TFEU. Parliament's legitimate political concerns are to be distinguished, however, from the legal question whether the measures concerned were properly based on Article 122 TFEU. From a legal perspective, the (only) relevant question is whether the choice of legal basis test indeed points to Article 122 TFEU.

To this end, this study clarified **the precise scope of the two legal bases in Article 122 TFEU**. While both are typically presented as emergency legal bases, the study has found that this is only so for Article 122(2) TFEU. **Article 122(1) TFEU is not a crisis legal basis and, therefore, has a wider scope**. In fact, there are only two main limits to the exceptionally broad power conferred by this provision on the Council. First, recourse to Article 122(1) TFEU to develop economic policy must not undermine or turn upside down the principle flowing from Articles 2(3) and Article 5(1) TFEU that the Member States remain the primary actors responsible for economic policy. Second, Article 122(1) TFEU prescribes that it is without prejudice to other legal bases in the Treaties. That clause has been interpreted in this study as not prescribing an absolute priority of those other legal bases over Article 122(1) TFEU. Instead, measures of which the aim and content points to another legal basis in the Treaties could still be adopted based on Article 122(1) TFEU if the context so requires.

Applied to some of the recently adopted measures, the study has found that **the Council has in effec acted *intra vires*, although it has insufficiently motivated its measures in light of the 'without prejudice to' clause of Article 122(1) TFEU**. This finding directly fed into the formulation of a number of **recommendations to ensure a better safeguarding of Parliament's prerogatives** when the Council has recourse to Article 122 TFEU.

First, **the Council (and Commission) should** be forced to **explicitly motivate the measures** (and proposals) in light of the 'without prejudice to' clause. Secondly, **Parliament can** also **leverage its budgetary powers** to, indirectly, have a say on the measures adopted pursuant to Article 122 TFEU. This has been partially realised through the IIAs of 16 December 2020. However, not every policy issues is a budgetary issue and turning policy issues (with limited budgetary implications) into budgetary issues in order to trigger the application of the IIAs would appear to constitute bad governance. A third, and more sound, way to bolster Parliament's position is to come to **an agreement**, ideally between the three Institutions, **on a default 'facultative' consultation of Parliament** whenever the adoption of measures based on Article 122 TFEU is contemplated. The study has found that such a consultation can be introduced in full respect of the current Treaty framework.

Finally, this study has looked into the possibility of **amending the Treaties**. For the purposes of improving the participation of Parliament in the decision-making pursuant to Article 122 TFEU, the ordinary revision procedure and the simplified procedure of Article 48(6) TEU could be relied on. Under

these procedures of course almost any change to the decision-making procedure is possible, and the study has noted that different committees of the European Parliament have already put forward different proposals. This study proposed to improve Parliament's involvement through **a special legislative procedure prescribing the consent of Parliament**, to ensure both greater transparency and Parliamentary involvement, without sacrificing speediness in those cases where urgent action is required.

REFERENCES

Case law of the Court of Justice

- Case 25/70, *Köster*, ECLI:EU:C:1970:115.
- Joined Cases 9 & 11/71, Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v Commission, ECLI:EU:C:1972:52.
- Case 5/73, Balkan Import, ECLI:EU:C:1973:109.
- Case 138/79, Roquette Frères v Council, ECLI:EU:C:1980:249.
- Case 68/86, UK v Council, ECLI:EU:C:1988:85.
- Case C-65/90, Parliament v Council, ECLI:EU:C:1992:325.
- Case C-426/93, Germany v Council, ECLI:EU:C:1995:367.
- Case C-122/94, Commission v Council, ECLI:EU:C:1996:68.
- Case C-27/04, Commission v Council, ECLI:EU:C:2004:436.
- Case C-133/06, Parliament v Council, ECLI:EU:C:2008:257.
- Case C-166/07, Parliament v Council, ECLI:EU:C:2009:499.
- Case C-130/10, Parliament v Council, ECLI:EU:C:2012:472.
- Case C-656/11, UK v Council, ECLI:EU:C:2014:97.
- Case C-658/11, Parliament v Council, ECLI:EU:C:2014:202
- Joined Cases C-103/12 and C-165/12, Parliament & Commission v Council, ECLI:EU:C:2014:2400.
- Case C-370/12, Pringle, ECLI:EU:C:2012:756.
- Case C-382/12 P, MasterCard Inc. v Commission, ECLI:EU:C:2014:2201.
- Case C-81/13, UK v Council, ECLI:EU:C:2014:2449.
- Case C-508/13, Estonia v Parliament & Council, ECLI:EU:C:2015:403.
- Case C-62/14, Gauweiler, ECLI:EU:C:2015:400.
- Case C-113/14, Germany v Parliament & Council, ECLI:EU:C:2016:635.
- Joined Cases C-643/15 and C-647/15, Slovakia & Hungary v Council, ECLI:EU:C:2017:631.
- Case C-589/15 P, Anagnostakis v Commission, ECLI:EU:C:2017:663.
- Case C-5/16, Poland v Parliament & Council, ECLI:EU:C:2018:483.
- Joined Cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v Commission, ECLI:EU:C:2018:873.
- Case C-482/17, Czechia v Parliament & Council, ECLI:EU:C:2019:1035.
- Joined Cases C-80/18 to C-83/18, UNESA, ECLI:EU:C:2019:934.

- Case C-180/20, Commission v Council, ECLI:EU:C:2021:658.
- Case C-181/20, VYSOČINA WIND, ECLI:EU:C:2022:51.
- Case C-695/20, Fenix International, ECLI:EU:C:2023:127.
- Case C-156/21, Hungary v Parliament & Council, ECLI:EU:C:2022:97.
- Case C-259/21, Parliament v Council, ECLI:EU:C:2022:917.
- Case C-391/21, Inspectoratul General pentru Imigrări, ECLI:EU:C:2022:1020.
- Case C-657/21, Parliament v Commission (removed from the register).
- Case C-675/22: Action brought on 2 November 2022 — Poland v Council (pending)

Opinions of Advocates General

- Opinion of AG Roemer in Case 5/73, Balkan Import, ECLI:EU:C:1973:71.
- Opinion of AG Mengozzi in Case C-355/10, Parliament v Council, ECLI:EU:C:2012:207.
- View of AG Kokott in Case C-370/12, Pringle, ECLI:EU:C:2012:675.
- Opinion of AG Wahl in Case C-207/13, Wagenborg Passagiersdiensten BV, ECLI:EU:C:2014:198.
- Opinion of AG Cruz Villalón in Case C-364/13, International Stem Cell, ECLI:EU:C:2014:2104.
- Opinion of AG Szpunar in Case C-240/14, Eleonore Prüller-Frey, ECLI:EU:C:2015:325.
- Opinion of AG Bot in Joined cases C-643/15 and C-647/15, Slovakia & Hungary v Council, ECLI:EU:C:2017:618.
- Opinion of AG Ćapeta in Case C-330/22, Friends of the Irish Environment CLG, ECLI:EU:C:2023:487.

Case law of the General Court

- Case T-94/10, Rütgers v ECHA, ECLI:EU:T:2013:107.
- Case T-450/12, Anagnostakis v Commission, ECLI:EU:T:2015:739.
- Case T-530/19, Nord Stream AG v Parliament & Council, ECLI:EU:T:2020:213.
- Case T-646/20, NG v Parliament & Council, ECLI:EU:T:2021:498.
- Case T-759/22: Action brought on 2 December 2022 — Electrawinds Shabla South EAD v Council (pending)
- Case T-775/22: Action brought on 12 December 2022 — TJ e.a. v Council (pending)
- Case T-802/22: Action brought on 28 December 2022 — ExxonMobil v Council (pending)
- Case T-795/22: Action brought on 20 December 2022 — TV and TW v Council (pending)
- Case T-803/22: Action brought on 30 December 2022 — TZ v Council (pending)

Case law of national courts

- BVerfG, Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21.

EU secondary legislation

- Conseil, Protocol d'accord relative aux problèmes énergétiques intervenu entre les gouvernements des États membres des Communautés européennes, à l'occasion de la 94e session du Conseil spécial de ministres de la Communauté européenne du charbon et de l'acier tenue le 21 avril 1964 à Luxembourg, OJ 1099/64.
- Règlement 1586/69 du Conseil relatif à certaines mesures relevant de la politique de conjoncture à prendre dans le secteur agricole à la suite de la dévaluation du franc français, OJ 1969 L 202/1.
- Council Directive 68/414 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, OJ 1968 L 308/14.
- Council Decision 71/143 setting up machinery for medium-term financial assistance, OJ 1971 L 73/15.
- Council Directive 73/238 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products, OJ 1973 L 228/1.
- Council Decision 74/120 on the attainment of a high degree of convergence of the economic policies of the Member States of the European Economic Community, OJ 1974 L 63/16.
- Council Regulation 2101/76 temporarily and totally suspending the autonomous Common Customs Tariff duties on a number of fresh or chilled vegetables, OJ 1976 L 235/17.
- Council Regulation 2366/77 laying down interim measures for the conservation and management of North Sea herring, OJ 1977 L 277/8.
- Council Directive 2004/67 concerning measures to safeguard security of natural gas, OJ 2004 L 127/92.
- Council Regulation 407/2010 establishing a European financial stabilisation mechanism, OJ 2010 L 118/1.
- Regulation 994/2010 of the European Parliament and of the Council concerning measures to safeguard security of gas supply, OJ 2010 L 295/1.
- Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47.
- Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, OJ 2013 C 373/1.
- Council Regulation 2016/369 on the provision of emergency support within the Union, OJ 2016 L 70/1.
- Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123/1.

- Council Decision 2020/2053 on the system of own resources of the European Union, OJ 2020 L 424/1.
- Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ 2020 L 433I/23.
- Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ 2020 L433I/28
- Regulation 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility, OJ 2021 L 57/17.
- Council Regulation 2022/1369 on coordinated demand-reduction measures for gas, OJ 2022 L 206/1.
- Council Regulation 2022/1854 on an emergency intervention to address high energy prices, OJ 2022 L 261I/1.
- Council Regulation 2022/2372 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, OJ 2022 L 314/64.
- Council Regulation 2023/706 amending Regulation 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation, OJ 2023 L 93/1.

Non-binding acts of the EU institutions

- Parlement européen, Résolution sur les compétences et les pouvoirs du Parlement européen, OJ 1963, p. 1916.
- Conseil des Communautés européennes, Déclaration concernant le renforcement des pouvoirs de l'Assemblée faite par le Ministre LUNS au cours de la session du Conseil de la CEE des 30 novembre et 1er décembre 1964, Doc. 1622/64.
- Parlement européen, Rapport sur les compétences et les pouvoirs du Parlement européen, Rapporteur M. Hans Furler, Documents de séances, Doc. 31/65.
- Parlement européen, Résolution sur les problèmes juridiques de la consultation du Parlement européen, OJ 1967, 268/7.
- European Parliament, Resolution on Relations between the European Parliament and the Council, OJ 1981 C 234/52.
- Commission communication concerning autonomous tariff suspensions, OJ 1989 C 235/2.
- Council of the EU, Manual of precedents for acts established within the Council of the European Union, Fourth Edition, July 2002.
- Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, 2015.

- Opinion of the Council Legal Service on Next Generation EU, Council Doc. 9062/20.
- Joint declaration of the European Parliament, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget, OJ 2020 CI 444/5.
- European Commission, Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM(2021) 577 final.
- State of Play regarding Council Regulation on the emergency framework regarding medical countermeasures in Council Doc. 15132/21.
- European Parliament, Resolution on the call for a Convention for the revision of the Treaties, OJ 2022 C 493/130.
- Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design, COM(2023) 148 final.

Doctrine

- Carlos-Manuel Alves, 'La hiérarchie du droit dérivé unilatéral à la lumière de la Constitution européenne: révolution juridique ou sacrifice au nominalisme?' (2004) 40 Cahiers de droit européen 5-6, pp. 691-726.
- Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities', in: Marjan Peeters & Mariolina Eliantonio (eds), Research Handbook on EU Environmental Law, Cheltenham, Edward Elgar, 2020, pp. 7-21.
- Rüdiger Bandilla, 'Art. 100 EGV', in Eberhard Grabitz & Meinhard Hilf (eds), Das Recht der Europäischen Union, München, Beck, EL 31.
- René Barents, 'De post-Lissabonrechtspraak over het institutioneel evenwicht', (2019) 67 Tijdschrift voor Europees en economisch recht 7/8, pp. 327-348.
- Ian Begg et al., 'The Next Revision of the Financial Regulation and the EU Budget Galaxy', Study requested by the BUDG committee, PE 721.500 - March 2022, 86 p.
- Merijn Chamon, The European Parliament and Delegated Legislation - An Institutional Balance Perspective, Oxford, Hart Publishing, 232 p.
- Richard Crowe, 'The European Budgetary Galaxy', (2017) 13 European Constitutional Law Review 3, pp. 428-452.
- Bruno De Witte , 'Legal Instruments and Law-Making in the Lisbon Treaty', in: Stefan Griller and Jacques Ziller (eds), The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty, Wien, Springer, 2008, pp. 79-108.
- Bruno De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', (2021) 58 Common Market Law Review 3, pp. 635-682.
- Bart Driessen, 'Interinstitutional conventions and institutional balance', (2008) 33 European Law Review 4, pp. 550-562.

- Annegret Engel, The Choice of Legal Basis for Acts of the European Union, Cham, Springer, 2018, 142 p.
- Federico Fabbrini, 'Next Generation Eu: Legal Structure and Constitutional Consequences', (2022) 24 Cambridge Yearbook of European Legal Studies, pp. 45-66.
- Leo Flynn, 'Article 122 TFEU', in: Manuel Kellerbauer (ed.), The EU Treaties and the Charter of Fundamental Rights: A Commentary, Oxford, OUP, 2019, pp. 1282-1284.
- Rudolf Geiger, 'Art. 103a', in: EG-Vertrag: Kommentar zu dem Vertrag zur Grünndung der Europäischen Gemeinschaft, München, Beck, 1993, pp. 325-327.
- Ulrich Häde, 'Art. 122 AEUV', in: Christian Calliess & Matthias Ruffert, EUV/AEUV, München, Beck, 6. Auflage 2022.
- Caroline Heber, 'Europarechtliche Grenzen für den Wiederaufbaufonds', (2021) 56 Europarecht 4, pp. 416-453.
- Anne Marie Houdbine & Jean Raymond Verges, Le Parlement européen dans la construction de l'Europe des six, Paris, Presses Universitaires de France, 1966, 184 p.
- Jean-Paul Keppenne, 'Economic Policy Coordination', in: Fabian Amtenbrink & Christoph Herrmann (eds), The EU Law of Economic and Monetary Union, Oxford, OUP, 2020, pp. 787-812.
- Päivi Leino-Sandberg & Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 2, pp. 433-472.
- Jean-Victor Louis, 'Guest editorial: The No-Bailout Clause and Rescue Packages', (2010) 47 Common Market Law Review 4, pp. 971-986.
- Francesco Martucci, 'Next Generation EU et la politique de cohésion économique, sociale et territoriale : vers une solidarité dans l'Union', (2023) Revue du droit de l'Union européenne 1, pp. 185-196.
- Nicholas Otto, Die Vielfalt unionaler Rechtsetzungsverfahren, Tübingen, Mohr Siebeck, 2022, 353 p.
- Jean-François Picard, 'Les pouvoirs du Parlement européen', (1977) Pouvoirs - Revue française d'études constitutionnelles et politiques 2, pp. 37-52.
- Jörn Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 Common Market Law Review 2, pp. 263-291.
- Olivier Renard-Payen, 'La fonction consultative du parlement européen dans le cadre du traité instituant la Communauté Economique Européenne', (1965) 1 Revue trimestrielle de droit européen 4, pp. 526-552.
- Christoph Sasse, Le renforcement des pouvoirs du Parlement et spécialement ses nouveaux pouvoirs budgétaires, in Le Parlement européen: pouvoirs, élection, rôle futur: actes du huitième Colloque de l'I.E.J.E. sur les Communautés européennes organisé à Liège, les 24, 25 et 26 mars 1976, Liège, Institut d'études juridiques européennes, 1976, pp. 21-71.
- Alexander Schaub, Die Anhörung des Europäischen Parlaments im Rechtsetzungsverfahren der EWG, Berlin, Duncker & Humblot, 1971, 184 p.

- Frank Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts „Next Generation EU"', (2020) Neue Juristische Wochenschrift 42, pp. 3085-3091.
- Francesco Sciaudone, 'Articulo 100', in: Antonio Tizzano (ed.), Trattati dell'Unione europea e della Communita europea, Milano, Giuffrè, 2004, pp. 669-671.
- Paolo Stancanelli , 'Le système décisionnel de l'Union', in: Giuliano Amato, Hervé Bribosia and Bruno De Witte (eds), Genèse et destinée de la constitution européenne: commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir, Bruxelles, Bruylant, 2007, pp. 485-543.
- David Symes, 'The European Community's common fisheries policy', (1997) 35 Ocean & Coastal Management 2-3, pp. 137-155.
- Claudia Wutscher, 'When Size Matters', in: Ruth Weber (ed.), The Financial Constitution of European Integration, Oxford, Hart Publishing, 2023, pp. 131-144.

Blogposts

- Merijn Chamon, 'The Rise of Article 122 TFEU', Verfassungsblog, 1 February 2023.
- Päivi Leino-Sandberg, 'Who is ultra vires now?', Verfassungsblog, 18 June 2020.
- René Repasi, 'A Dwarf in Size, But a Giant in Shifting a Paradigm – The European Instrument for Temporary Support to Mitigate Unemployment Risks (SURE)', EU Law Live, Weekend Edition No 19, 29 May 2020.

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, looks into the peculiar nature of Article 122 TFEU as a non-legislative legal basis pursuant to which the European Parliament is not involved in the decision-making. It concludes that the recent recourse to Article 122 TFEU was legally defensible but that the Council does not sufficiently take into account the 'without prejudice to' clause in Article 122(1) TFEU. The analysis identifies different ways to bolster Parliament's position under the current Article 122 TFEU and makes suggestions for Treaty amendment.

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